Supreme Court, U. S.
FILED
SEP 2 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 75-1892

UNITED STATES OF AMERICA,

Petitioner

—*v.*—

JEFFREY R. MACDONALD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 29, 1976
CERTIORARI GRANTED JUNE 20, 1977

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 75-1892

UNITED STATES OF AMERICA,

Petitioner

—*v.*—

JEFFREY R. MACDONALD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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DOCKET ENTRIES

DATE	PROCEEDINGS

1/24/75 Fil, & ent, INDICTMENT; Orig.

1/27/75 Fil, & ent, ORDER: To open Indictment upon filing of this Order. J Dupree Cr OB #11 Page 200

1/24/75 ISSUED—WARRANT FOR ARREST OF DEFT. issued Jan 24, 1975

2/12/75 Fil, & ent, U.S. Marashal's return serv. Jeffrey R. MacDonald 1/28/75 USDM.,

2/24/75 Received from the Central District of California Trust Deeds Nos. 3347, 3334, and 3335 secured in that District. Deeds pertain to a follow-up replacement bond which to date has not been made as such Deeds only justify about half the required amount of the bond. No. 3347—John R. & Bernadette R. Page in the amount of $16,000.00; No. 3334—Paul and Eva Hildebrand $25,000; No. 3335 Gordon, Fields & Boland in the amount of $15,000.00. Forwarded to Raleigh under Certificate No. 147895 to be placed in case file, with copy of docket.

2/27/75 Fil, & ent, NOTICE OF MOTION: Orig and c.c. & MOTION TO TRANSER by

2/27/75 Fil, & ent, MOTION FOR LEAVE TO EXCUSED FROM COMPLIANCE WITH, DISTRICT COURT RULE 1(e) and notice of Motion: Orig Hd and c.c.

Fil, & ent, ORDER: deft, shall comply w/local rule 1(E) by associating counsel who is a member of the bar of this court and who resides in and maintains and office in the State of North Carolina on or before April 7, 1975. (J Dupree) Cr OB #11 p. 229

3/10/75 Fil, & ent, WAIVER OF ARRAIGNMENT: Orig and c.c. c.c. to J Butler 2 c.c. to USA.

DATE	PROCEEDINGS

Fil, & ent, STIPULATION: Orig and c.c. c.c. to J Butler, all pre-trial motions shall be filed before April 7, 1975 and pre-trial briefs not later than 20 days after April 7, 1975. Arraignment in this case shall be postponed until after all of the motions and responses have been filed. Arrainment is postponed until May 5, 1975. J Dupree, to be heard at Raleigh, NC.

4/7/75 Fil, & ent, Trust Deed in the amount of $1700.00, Stephen R. Shea 4242 Calhoun, Huntington Beach Calif. Recorded in Orange Co. Calif.

Fil, & ent, The Original Appearance bonds in amounts of $32,000.00, $28,000.00 and $40,000.00 posted by deft, to appear in this district EDNC, and have replaced the original cash bond (minute order see below

Fil, & ent, Minute order in Chambers, Appearance Bonds dated 3/1/75 amounting to $100,000.00 in the above matter replace the original Cash bond of 1/31/75, and that the original Cash Bond is exonotated signed John R. Kronenberg, U.S. Magistrate, CD of Calif.

Fil, & ent, MOTION FOR EXTENSION OF TIME: Orig and c.c.

Fil. & Ent. ORDER extending time within which the United States may respond to the M/Transfer filed by defendant to and including April 28, 1975, Orig. & 1 copy. DUPREE, J. (2 cert. copies to US Atty

Fil. & Ent. Short Form Deed of Trust of STEPHEN ROBERT SHEA, 4242 Calhoun St., Huntington Beach, California, in the amount of $17,000.00 to be used as security in lieu of cash bail for deft. MacDonald, Central District of California's Number MG75-3024M. Receipt by Cert. Mail #78966 of Deed acknowledge to Mr. Edward M. Kritzman, Clerk, Central Dist. of Calif., U.S. Court House, Los Angeles, California 90012.

DATE	PROCEEDINGS

Fil. & Ent. Short Form Deed of Trust of WILLIAM C. & CAROLYN G. HURST as sureties, 5441 Las Lomas St., Long Beach, Calif., in the amount of $15,000.00 submitted as partial justification to secure replacement bond for deft. MacDonald; received by Cert. Mail #780663 and receipt acknowledged to Edward M. Kritzman, Clerk, Central Dist. of Calif.

Fil, & ent, NOTICE OF MOTION: SUPRESS EVIDENCE OBTAINED AS A RESULT OF UNLAWFUL SEARCH AND SEIZURES AND TO DISMISS THE INDICTMENT: Orig.

Fil, & ent, NOTOCE OF MOTION: SUPRESS EVIDENCE PURSUANT TO FEDERAL RULE OF CRIMINAL PROCEDURE 41, Orig.

Fil, & ent, NOTICE OF MOTION: INSPECTION, REPRODUCTION AND COPYING OF THE RECORDS AND PAPERS IN THE CUSTODY OF THE CLERK OF THE COURT PURSUANT TO 28 U.S.C. 1867(a)(d) and (f) Orig.

Fil. & ent, NOTICE OF MOTION: INSPECTION AND COPYING OF GRAND JURY TESTIMONY: Orig.

Fil, & ent, DEFENDANT'S PRELIMINARY MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR INSPECTION AND COPYING OF GRAND JURY TESTIMONY: orig.

Fil, & ent, NOTICE OF MOTION: DISMISS THE INDICTMENT FOR DEFECTS IN THE GRAND JURY PROCEEDINGS AND PROSECUTORIAL MISCONDUCT BEFORE THE GRAND JURY. Orig.

Fil, & ent, NOTICE OF MOTION: DISCOVERY AND INSPECTION OF DOCUMENTS, ETC. PURSUANT TO FEDERAL RULE OF CRIMINAL PROCEDURE, 16 Orig.

DATE	PROCEEDINGS

Fil, & ent, NOTICE OF MOTION: DISMISS THE INDICTMENT BECAUSE OF DOUBLE JEOPARDY, COLLATERAL ESTOPPEL, Orig.

4/8/75 Fil, & ent, NOTICE OF MOTION: DISMISS THE INDICTMENT BECAUSE OF DISCRIMINATION IN THE SELECTION OF THE GRAND JURY, Orig.

4/8/75 Fil, & ent, NOTICE OF MOTION: DISMISS THE INDICTMENT FOR DENIAL OF RIGHT TO SPEEDY PROSECUTION AND TRIAL: Orig. C se filed to J Dupree in Raleigh, 4/24/75

4/25/75 Fil. & ent. RESPONSE TO MOTION FOR INSPECTION AND COPYING OF GRAND JURY TESTIMONY w/CS (2 CC to U.S.A. & cy. to J. Dupree)

Fil. & ent. GOVERNMENT'S ANSWER TO DEFENDANT'S MOTION TO DISMISS INDICTMENT FOR DENIAL OF RIGHT TO SPEEDY PROSECUTION AND TRIAL w/Attachments & C/S (2 CC to U.S.A. & 1 cy. to Judge)

Fil. & ent. GOVERNMENT'S RESPONSE TO SUPPRESS EVIDENCE PURSUANT TO FEDERAL RULE OF CRIM. PROCEDURE 41 w/CS (2 CC to U.S.A. & cy. to Judge)

Fil. & ent. GOVERNMENT'S RESPONSE TO MOTION TO DISMISS INDICTMENT BECAUSE OF DOUBLE JEOPARDY, COLLATERAL ESTOPPEL w/CS (2 CC to U.S.A. & cy. to Judge)

Fil. & ent. REPLY MEMORANDUM IN RESPONSE TO DEFENDANT'S "MOTION TO DISMISS INDICTMENT FOR DEFECTS IN THE GRAND JURY PROCEEDINGS AND PROSECUTORIAL MISCONDUCT BEFORE THE GRAND JURY" w/CS (2 CC to U.S.A. & cy. to Judge)

DATE	PROCEEDINGS

Fil. & ent. GOVERNMENT'S RESPONSE TO MOTION TO SUPPRESS EVIDENCE OBTAINED AS A RESULT OF UNLAWFUL SEARCH AND SEIZURE AND TO DISMISS THE INDICTMENTS w/CS (2 CC to U.S.A. & Cy. to Judge)

Fil. & ent. RESPONSE TO MOTION FOR INSPECTION, REPRODUCTION AND COPYING OF THE RECRDS AND PAPERS IN THE CUSTODY OF THE CLERK OF THE COURT PURSUANT TO 28, U.S.C., Section 1867(a), (d) & (f) w/CS (2 CC to USA & cy. to Judge)

Fil. & ent. GOVERNMENT'S MOTION FOR DISCOVERY w/CS (2 CC to USA & cy. to Judge)

Fil. & ent. RESPONSE TO MOTION FOR DISCOVERY AND INSPECTION OF DOCUMENTS, ETC., PURSUANT TO FEDERAL RULE OF CRIMINAL PROCEDURE 16 w/CS (2 CC to USA & Cy. to Judge)

Fil. & ent. RESPONSE TO MOTION TO DISMISS THE INDICTMENT BECAUSE OF DISCRIMINATION IN THE SELECTION OF THE GRAND JURY w/CS (2 CC to USA & Cy. to Judge)

See pg. 3 for 4/26 filing)

Fil. & ent. RESPONSE TO MOTION FOR TRANSFER w/CS (2 CC to USA & cy. to Judge)

Fil. & ent. SUPPLEMENT TO DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO TRANSFER UNDER FEDERAL RULE OF CRIMINAL PROCEDURE 21(b) w/Attachment (Official Airline Guide)

4/28/75 Fil. & ent. MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS EVIDENCE PURSUANT TO FEDERAL RULE OF CRIMINAL PROCEDURE 41(e) (Judge has copy)

DATE	PROCEEDINGS

Fil. & ent. MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR DISCOVERY AND INSPECTION OF DOCUMENTS, ETC., PURSUANT TO FEDERAL RULE OF CRIM. PROCEDURE P. 16 (Judge has copy)

Fil. & ent. DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO TRANSFER UNDER FEDERAL RULE OF CRIMINAL PROCEDURE 21(b) (Judge has copy)

Fil. & ent. MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE INDICTMENT DUE TO PROSECUTORIAL MISCONDUCT BEFORE THE GRAND JURY and AFFIDAVIT OF MICHAEL J. MALLEY and JEFFREY R. MACDONALD

Fil. & ent. DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR INSPECTION AND IN SUPPORT OF MOTION TO DISMISS INDICTMENT BECAUSE OF DISCRIMINATION IN THE SELECTION OF THE GRAND JURY and AFFIDAVIT OF MICHAEL J. MALLEY and RUTH ASTLE (Second Affidavit)

Fil. w/Judge Dupree: DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SUPPRESS EVIDENCE AND MOTION TO DISMISS THE INDICTMENT AGAINST DEFENDANT

6/75) Fil. w/Judge Dupree: MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE INDICTMENT AS BARRED BY THE DOUBLE JEOPARDY CLAUSE OF THE CONSTITUTION

5/2/75 Fil. & ent. DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO TRANSFER UNDER FEDERAL RULE OF CRIMINAL PROCEDURE 21(a) (Sur Prejudicial Publicity) w/Appendices 1, 2 & 3 (Judge has copy)

DATE	PROCEEDINGS

Fil. & ent. DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS INDICTMENT FOR DENIAL OF RIGHT TO SPEEDY PROSECUTION AND TRIAL

5/5/75 Fil. & ent. SUPPLEMENTARY REPLY MEMORANDUM IN RESPONSE TO DEFENDANT'S "MOTION TO DISMISS INDICTMENT FOR DEFECTS IN THE GRAND JURY PROCEEDINGS AND PROSECUTORIAL MISCONDUCT BEFORE THE GRAND JURY" w/CS (see p. — for additional 5/5/75 filings)

5/6/75 Fil. & ent. DEFENDANT'S SUPPLEMENTARY MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR INSPECTION AND COPYING GRAND JURY TESTIMONY

5/5-7/75 Hearing on Motions at Raleigh

5/5/75=10:00 a.m.— 1:20 p.m./3:00 p.m.—5:00 p.m. = 5 Hrs. 20 min.

5/6/75=10:00 a.m.—12:25 p.m./2:00 p.m.—5:00 p.m. = 5 Hrs. 25 min.

5/7/75=10:00 a.m.— 1:00 p.m./2:00 p.m.—3:35 p.m. = 4 Hrs. 35 min.

5/16/75 Fil. & ent. ORDER that deft.'s motion pursuant to 28 U.S.C., Sec. 1867(a)(d) & (f) for inspection of certain records and papers in custody of Clerk is denied. (DUPREE, J.) (CR O.B. #11, P. 300) (Ent. 5/16/75) Cert. cy. to Atty Segal—Air Mail & 1 Cert. Cy. to Atty. Stroud, Asst. U.S. Atty.

5/20/75 Fil. & ent. MEMORANDUM OF DECISION as to order denying deft.'s request for discovery. (DUPREE, J.) (CR. O.B. #11, P. 301) (Ent. 5/20/75) Cert. Cy. to Atty. Segal via Air Mail & Cert. Cy. to Asst. U.S. Atty. Stroud

DATE	PROCEEDINGS

5/21/75 Fil. & ent. SUPPLEMENTAL MEMORANDUM IN SUPPORT OF GOVERNMENT'S REPLY TO MOTION TO DISMISS FOR DOUBLE JEOPARDY w/Attachments (Cy. to Judge Dupree)

Fil. & ent. AFFIDAVIT OF BRIAN M. MURTAGH relative to wire tapping w/attachments

5/20/75 Fil. & ent. AFFIDAVIT OF FRANZ JOSEPH GREBNER, CO of Det. B, 3rd Military Police Group, Ft. Bragg, N.C., in 1970.

5/22/75 Fil. & ent. SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS THE INDICTMENT BECAUSE OF DISCRIMINATION IN THE SELECTION OF THE GRAND JURY

Fil. & ent. AFFIDAVIT of William F. Ivory, Spec. Agt., U.S.A. Crim. Invest. Command, Hqs., 2nd Reg., USACIDC, Heidelberg, Germany.

Fil. & ent. AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS INDICTMENT BECAUSE OF DISCRIMINATION IN THE SELECTION OF THE GRAND JURY and IN SUPPORT OF MOTION FOR INSPECTION SUR THE SAME MOTION (Third Affidavit)—Ruth Astle

Fil. & ent. SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR DISCOVERY OF RECORDS OF THE CLERK PURSUANT TO 28 U.S.C. 1860 et seq. SUR MOTION TO DISMISS INDICTMENT BECAUSE OF DISCRIMINATION IN THE SELECTION OF THE GRAND JURY

5/23/75 Fil. & ent. MOTION FOR SANCTIONS AGAINST THE GOVERNMENT

5/22/75 Hearing on Motions at Raleigh

5/22/75=10:00 a.m.—12:30 p.m./2:00 p.m.—3:45 p.m.= 4 hrs. 15 min.

5/23/75=10:00 a.m.—12:30 p.m.=2 hrs. 30 min.

DATE	PROCEEDINGS

5/23/75 Fil. & ent. NOTICE OF APPEAL by deft. of Order entered 5/16/75 denying deft.'s Motion for Discovery of Jury Selection Records made pursuant to 28 U.S.C. 1867. Cy. to Segal & U.S. Atty. w/cy. of rules governing appeals. Cy. to Ct. Rptr. & 4th Cir. & J. Dupree.

5/5/75 Fil. & ent. AFFIDAVIT OF MAJOR DAVID B. REED, III, Hqs. U.S.A. Crim. Invest. Commd Washington, D.C.

Fil. & ent. AFFIDAVIT OF COL. JACK G. PRUETT, Chief, Office of Safety & Security/Provost Marshal, Hqs., Military Traffic Mgmt. Commd., Washington, D.C.

Fil. & ent. COPY OF TELETYPE from U.S.A.CID C. Heidelberg, Germany TO: RUEA DUA/COMUSACIDC Washington, D.C./CIJA

Fil. & ent. SUPPLEMENTAL REPLY TO DEFENDANT'S MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS EVIDENCE PURSUANT TO FEDERAL RULES OF CRIMINAL PROCEDURE 41 (e). w/attachments & Affidavit of Paul M. Stombaugh, Special Agt. FBI, Chief, Chemistry Branch, Physicis & Chemistry Sec., FBI Laboratory.

Fil. & ent. SUPPLEMENTAL REPLY TO DEFENDANT'S MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE INDICTMENT AS BARRED BY THE DOUBLE JEOPARDY CLAUSE OF THE CONSTITUTION. w/attachments

Fil. & ent. GOVERNMENT'S REPLY TO DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS INDICTMENT FOR DENIAL OF RIGHT TO SPEEDY PROSECUTION AND TRIAL. w/attachments

See 6/12/75 entry on page 4

5/23/75 Fil. & Ent. PARTIAL TRANSCRIPT of argument on motions 5/22/75 at Ral.:19 pgs. Overby, Ct.R

DATE	PROCEEDINGS

5/23/75 Arraigned at Raleigh, N.C.—entered plea of not guilty, requested by jury, by private counsel.

Fil. & ent. ADDITIONAL MEMORANDUM OF LAW WITH REGARD TO GRAND JURY SELECTION PROCESS by Plff. w/Cert. of Ser.

Fil. &ent. AFFIDAVIT OF JAMES T. STROUD, Asst. U.S. Atty., re: statement of Ruth Astle in her affidavit of 5/19/75. w/attachments

5/29/75 Received cy. of Teletype Message: TO-Mr. Segal From: Gen. Crimes Sec., Crim. Sec. Washington, D.C.—Re: Freedom of Information Act Request for internal memoranda of the Justice Department—Denied by John C. Keeney, Acting Asst. Atty. Gen., Crim. Div.

5/30/75 Fil. & ent. ORDER GRANTING INSPECTION OF THE CLERK'S RECORDS re: selection process for Grand Jury which returned indictment & for prospective Petit Jury beginning 5/30/75—6/5/75. (DUPREE, J.) (CR OB #11, P. 302)

Fil. & ent. ORDER ON MOTION FOR TRANSFER—Motions of deft. for transfer of case to U.S.D.C., Central Dist. Calif. for trial are denied; case is transferred from Fayetteville Div. of this court to the Raleigh Division for trial; case set for trial in Ctrm. #1, 7th Floor, Fed. Bldg., 310 New Bern Ave., Raleigh, NC, at 10:00 a.m., Mon., 7/14/75. (DUPREE, J.) (CR O.B. #11, P. 303) CC to Mr. Stroud & Mr. Segal (Ent. 6/2/75)

Fil. & ent. ORDER that order dtd. 5/16/75, denying deft.'s motion for discovery pur. to 28 U.S.C., Sec. 1867(f) is vacated; deft. shall have untill close of reg. business day on 6/5/75 to complete discovery; such hearing as may be necessary on deft.'s motion under 28 U.S.C., Sec. 1867(a) shall be resumed on 6/6/75 in Raleigh at 2:30 p.m. Deft.'s filing fee for notice of appeal should be returned. (DUPREE, J.) (CR. O.B. #11, P. 304) (Ent. 6/2/75) CC to Mr. Stroud & Mr. Segal & Finance Deputy

DATE	PROCEEDINGS

6/2/75 Fil. & ent. NOTICE OF APPEAL by deft. of Order denying deft.'s motion for transfer made pursuant to R.21(a) & (b), F.R.Cr.P. (1 cy. taken to J. Dupree, 3 cys. to Atty. Segal, cy. to U.S. Atty. by Segal's secretary) Cy. to 4th Cir. w/Cert. cy. of docket entries

6/3/75 Fil. & ent. WITHDRAWAL OF APPEAL from Order of U.S. Dist. Ct., E.D.N.C., denying deft.'s Motion for Discovery of Jury Selection Records made pursuant to 28 U.S.C. 1867. 4 cys. to Atty. Segal Sect. who was delivering a cy. to U.S. Atty. 1 cy. to 4th Cir. Ct. of Appeals.

Fil. & Ent. ORDER GRANTING INSPECTION OF CLERK'S RECORDS w/regard to selection process for the Grand Jury which returned the Indictment in this case and for the prospective Petit Jury in the instant case. 2 cc to U.S. Atty. 1 copy for Clerk. DUPREE, J. (Cr. O.B. #11, P. 305)

6/12/75 Fil. & Ent. ADDITIONAL MEMORANDUM OF LAW WITH REGARD TO JURY SELECTION PROCESS AND JURY COMPOSITION, w/Certificate of Service; 1 copy. Clerk's copy to J. Dupree.

6/16/75 Cert. copy of ORDER ON MOTION FOR TRANSFER, filed 5/30/75, mailed to Clerk of the Fourth Circuit Court of Appeals, Richmond, Virginia, at the request of Asst. U.S. Attorney Jay Stroud. Cy of letter of transmittal to Atty Segal.

6/16/75 Cert. copy of Notice of Appeal from Order on Motion for Transfer mailed to Court Reporter Elizabeth Overby, P.O. Box 30101, Raleigh, N.C.

6/25/75 RECORD ON APPEAL from ORDER denying defendant's Motion to Transfer mailed to Fourth Circuit Court of Appeals, at Richmond, Virginia; Copy of INDEX mailed to counsel of record

DATE	PROCEEDINGS

7/2/75 Fil. & Ent. AFFIDAVIT of Dr. R.J. Hader and Mr. Bill Stines w/regard to supervising and directing a scientifically based sampling of the jury pool for US Dist. Ct., EDNC, together with Tables 1 thru 3 attached; 1 copy. (Copy to J. Dupree.

Fil. & Ent. MOTION OF ROBERT SADOFF, M.D. FOR TRANSCRIPT OF GRAND JURY TESTIMONY, w/Exhibit A attached and a Certificate of Service; Atty for Robert Sadoff—Adam Stein, Esquire, Chapel Hill, N.C., associated with David Ferleger, Esquire, Philadelphia, Pa.; 1 copy (Copy to J. Dupree. w/proposed order)

7/3/75 Issued NOTICE OF HEARING ON DEFT'S MOTION TO DISMISS INDICTMENT BECAUSE OF DISCRIMINATION IN THE SELECTION OF THE GRAND JURY on JULY 8, 1975, Courtroom #1, Federal Building, Raleigh, N.C.—to all counsel of record w/copy to Court Reporter Elizabeth Overby, Raleigh, and to Attys Adam Stein, Chapel Hill, N.C. & David Ferleger, Atty, Philadelphia, Pa.

Fil. & Ent. AFFIDAVIT of Shirley Ann Rodgers with regard to job as jury clerk and procedure for obtaining names for Master Jury Wheel, dated and sworn to on 6/16/75; 1 copy. (Copy to J. Dupree by U.S. Attorney)

Fil. & Ent. Gov.'s RESPONSE TO MOTION OF DR. ROBERT SADOFF FOR TRANSCRIPT OF GRAND JURY TESTIMONY, w/Cert. of Service; 1 copy (Copy to J. Dupree by US Atty)

7/7/75 Fil. & Ent. Certified copy of ORDER of COURT OF APPEALS DISMISSING defendant's appeal from an order denying a motion to transfer case to U.S. Dist. Court for the Central District of California, and the response of Jeffrey R. MacDonald for the reason that the order denying transfer is not appealable. c/John D. Butzner, Jr., with the concurrence of Judge Craven and Judge Russell.

DATE	PROCEEDINGS

7/7/75 Fil. & Ent. AFFIDAVIT of Asst. U.S. Atty. JAMES T. STROUD, JR., in connection with DR. SADOFF'S motion to obtain Transcript of his Grand Jury Presentation; 1 copy. (Copy to J. Dupree by US Atty)

Fil. & Ent. TRANSCRIPT of Defendant's testimony in a hearing on 3/22/75 upon defendant's Motions, to Supress Evidence; To Dismiss. 31 pages. Elizabeth Overby, Ct. Reporter.

7/8/75 Fil. & Ent. AFFIDAVIT of BRIAN MURTAGH; 1 copy. (Copy to J. Dupree)

Fil. in open Court DEFENDANT'S SECOND SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO DISMISS INDICTMENT BECAUSE OF DISCRIMINATION IN THE SELECTION OF THE GRAND JURY w/two articles attached; 1 copy-to J. Dupree.

HEARING on M/Dismiss Indictment because of Discrimination in Selection of Grand Jury, held at Raleigh. Deft. allowed until July 18, 1975, to file Affidavit of Dr. Sperlich and further Memo of Law; Court time on 7/7/75: 5 hrs. on 7/8/75: 2 hrs. 55 min.

7/9/75 Fil. & Ent. THIRD SUPPLEMENTAL MEMORANDUM in support of M/Dismiss Indictment because of Discrimination in the Grand Jury; 1 copy. (Clk's Copy to J. Dupree)

Fil. & Ent. AFFIDAVIT in support of M/Dismiss Indictment because of Discrimination in Selection of the Grand Jury (FOURTH AFFIDAVIT); 1 copy. (Clk's copy to J. Dupree)

7/10/75 RECEIVED Record on Appeal on M/Transfer to Cent. Dist. of Calif; Appeal DISMISSED. Cert. Copy of Order dismissing appeal filed 7/7/75.

DATE	PROCEEDINGS

7/15/75 Fil. & Ent. AFFIDAVIT of DR. PETER W. SPERLICH in support of M/Dismiss Indictment because of Discr. in selection of Grand Jury, w/EXHIBIT "A" attached; 1 copy. & Cert. of Service on U.S. Attorney. Clerk's copy to J. Dupree

7/15/75 Fil. & Ent. SUPPLEMENTAL MEMO OF LAW in support of M/Suppress Evidence and to Dismiss Indictment, w/affidavits in support of said motion; 1 copy. Clerk's copy to J. Dupree.

7/8/75 Fil. & ent. PARTIAL TRANSCRIPT OF DR. PETER W. SPERLICH'S TESTIMONY AT RALEIGH, N.C., 7/8 & 9/75 (83 pgs—Henrietta Buck, Ct. Rptr.) Folder #5Fil. & ent. PARTIAL TRANSCRIPT OF DR. ROBERT J. HADER'S TESTIMONY AT RALEIGH, N.C. 7/9/75 (109 pgs—Henrietta Buck, Ct. Rptr.) Folder #5

7/17/75 Fil. & Ent. ORDER of Clerk, Fourth Circuit Court of Appeals DENYING the petition for writ of mandamus; cert. copy of 4th Circ. Order. Copy to J. Dupree.

7/21/75 Fil. & Ent. Deft's RESPONSE TO GOVERNMENT'S ADDITIONAL MEMO OF LAW w/regard to M/Dismiss Indictment because of discrimination in selection of Grand Jury; Copy to J. Dupree.

7/21/75 Fil. & Ent. DEFT'S SUPPLEMENTAL MEMO OF LAW in support of M/Dismiss Indictment because of discrimination in selection of Grand Jury, AND Response to Gov's Additional Memo of Law regarding same dated 6/12/75; Copy to J. Dupree.

7/21/75 Fil. & Ent. DEFT'S SUPPLEMENTAL MEMO OF LAW in support of M/Dismiss Indictment because of DOUBLE JEOPARDY, and AFFIDAVIT IN SUPPORT THEREOF; Copy to J. Dupree.

DATE	PROCEEDINGS

7/21/75 Fil. & Ent. DEFT'S SUPPLEMENTAL MEMO OF LAW in support of M/Suppress pursuant to Rule 41, and AFFIDAVIT IN SUPPORT OF SAID MOTION; Copy to J. Dupree.

7/21/75 Fil. & Ent. CERTIFICATE OF SERVICE on Government of the above four filings on 7/21/75; Copy to J. Dupree.

7/28/75 Fil. & ent. ORDER OVERRULING MOTION TO DISMISS INDICTMENT—GRAND JURY SELECTION —Ordered that motion of deft. to dismiss indictment because of discrimination in selection of grand jury is denied. (DUPREE, J.) (CR. OB #— P. ——) (Ent. 7/29/75) CC to Atty. Stroud & Atty. Segal.

7/29/75 Fil. & ent. ORDER ON DEFENDANT'S REMAINING PRE-TRIAL MOTIONS—Motion for Inspection & copying of grand jury Testimony—Denied; Motion for Discovery & Inspection of Documents, Etc., Pursuant to Federal Rule of Criminal Procedure 16 as amended—Denied; Motion To Dismiss Indictment for Defects in Grand Jury Proceeding & Prosecutorial Misconduct before the Grand Jury—Denied; Motion to Dismiss Indictment because of Double Jeopardy and Collateral Estoppel—Denied; Motion to Suppress Evidence Obtained as a result of Unlawful Search & Seizure & to Dismiss the Indictment—Denied; Motion to Suppress Evidence Pursuant to Fed.R. of Cr. P., 41(e)—Denied; Motion to Dismiss Indictment for Denial of Right to Speedy Prosecution & Trial—Denied and deft.'s motion for leave to conduct further discovery in action is denied. (DUPREE, J.) (CR OB# —, P. —) (Ent. 7/29/75) CC to Attys. Stroud & Segal.

Fil. & ent. ORDER ON GOVERNMENT'S MOTION FOR DISCOVERY—deft's. discovery motion having been denied, the government's motion pursuant to R. 16(c) for leave to inspect & copy exhibits of deft. to be introduced at trial is also denied. (DUPREE, J.) (CR. O.B.# —, P. —) (Ent. 7/29/75) (CC to Attys. Stroud & Segal.

DATE	PROCEEDINGS

Fil. & ent. ORDER—that a special session of court be convened in Ctrm. #1, 7th Floor, Fed. Bldg., Raleigh, N.C., at 10:00 a.m., Mon., 8/18/75 for trial of this action; for purposes of the trial the Clerk shall summon 50 jurors to appear at 9:30 a.m., Mon., 8/18/75 & 50 additional jurors to appear at 9:30 a.m., on Tues., 8/19/75. Copies of order to be served upon counsel & deft., Jeffrey Robert MacDonald, 16052 Mariner Dr., Huntington Beach, Calif., by certified mail. (DUPREE, J.) (CR. O.B. #—, P. —) (Ent. 7/29/75) CC handed to Mr. Stroud & CC to Atty.

Segal & MacDonald by Cert. Mail #219888 & 219889. Segal's cy. of this order & others mailed Air Mail.

7/30/75 Fil. & ent. SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO DISMISS INDICTMENT FOR DEFECTS IN GRAND JURY PROCEEDINGS AND PROSECUTORIAL MISCONDUCT BEFORE THE GRAND JURY w/CS

Fil. & Ent. ROBERT SADOFF'S BRIEF in support of M/for transcript of his Testimony before the Grand Jury; 2 copies, 1 copy to J. Dupree. w/CERT. OF SERVICE.

8/7/75 Fil. & Ent. NOTICE OF APPEAL by defendant from Order entered 7/28/75 denying deft's M/D Indictment Because of Discrimination in the Selection of the Grand Jury; 1 copy. Copy to J. Dupree; Copies to counsel w/advice re Rules governing appeals.

8/8/75 Fil. Ent. NOTICE OF APPEAL by defendant from ORDER entered July 29, 1975, entitled "ORDER ON DEFENDANT'S REMAINING PRE-TRIAL MOTIONS", signed by F. T. Dupree, Jr., Judge; 1 copy. Copy to J. Dupree; Copies to counsel w/advice re Rules governing appeals; copy to Court Reporter, Elizabeth Overby.

DATE	PROCEEDINGS

8/10/75 Mailed RECORD ON APPEAL from Order denying defendant's Motion to Dismiss Indictment because of Discrimination in the Selection of the Grand Jury to U.S. Court of Appeals for Fourth Circuit at Richmond, Virginia; Copy of Index mailed to Counsel of Record.

8/12/75 Mailed RECORD ON APPEAL from ORDER ON DEFENDANT'S REMAINING PRE-TRIAL MOTIONS" entered July 29, 1975, signed by Judge Dupree, to U.S. Court of Appeals for Fourth Circuit at Richmond, Virginia. Copy of Index mailed to Counsel.

8/11/75 Mailed SUPPLEMENTAL Record on Appeal, VOLUME IV, from ORDER ON DEFENDANT'S REMAINING PRE-TRIAL MOTIONS to 4th Circuit Court of Appeals at Richmond, Va.

8/11/75 Issued NOTICE OF PRE-TRIAL CONFERENCE in J. Dupree's Chambers at Raleigh on Friday, August 15, 1975, at 10:00 a.m. (To all counsel of record)

8/12/75 Issued ORDER TO APPEAR for trial at Raleigh on Monday, August 18, 1975 at 1:00 A.M., Cert. Mail No. 17,254 & 17,255 to Jeffrey R. MacDonald, 16052 Mariner Dr., Huntington Beach, Calif. 92647 and C/o St. Mary's Hospital, Long Beach, California 90801.

8/13/75 Fil. & Ent. Mar's return on Subpoena: Exec. 8/8/75 on Franz J. Grebner, at 1547 Marlborough Road, Fayetteville, N.C.

8/13/75 Fil. & Ent. Mar's return on Subpoena: Exec. 8/8/75 at Tampa, Florida, by personal service on PAMELA KALIN and DONALD KALIN, W. Pearl & McDill Ave., S. Little General Offices &/McDill AFB respectively.

DATE	PROCEEDINGS

8/13/75 Fil. & Ent. Mar's return on Subpoena: RETURNED UNEXECUTED for the reason that Mrs. Janie Terry is now living at 226-B Cypress St., Grand Forks AFB, North Dakota.

8/14/75 Fil. & Ent. MOTION of Attorney DURANT WILLIAMS ESCOTT, for good cause shown, to withdraw as counsel of record for deft. MacDonald, w/Cert. of Service; 1 copy. Copy to J. Dupree. (Mr. Riley of Court of Appeals said to send ANY ORDER of our court, together with this motion, when filed.)

8/14/75 Fil. Gov's RESPONSE TO MOTION TO WITHDRAW, w/Cert. of Service; 1 copy. Copy to J. Dupree. Entered 8/15/75.

8/15/75 Fil. & Ent. Mar's return on Subpoenas as follows: Served 8/9/75 on Kenneth Gillespie, at Houston, Texas; on 8/11/75 on William Hancock, at Sanford, NC; and on 8/11/75 on John R. Nuchereno at Buffalo, New York.

8/18/75 Fil. & Ent. Cert. Copy of Court of Appeals' STAY ORDER AND ORDER ALLOWING APPEAL filed in U.S. Court of Appeals for Fourth Circuit on August 15, 1975, done by the clerk by direction of Judges Craven, Butzner, and Russell; xerox copy to J. Dupree.

8/18/75 Fil. & Ent. ORDER allowing Durant Wiliams Escott to withdraw as counsel of record for defendant R. MacDonald, and she is relieved of all further duties herein; DUPREE, J. Copy to Attys Segal, Escott & Stroud by Judges' office 8/18/75—to Segal by Cert. mail.

8/19/75 MAILED SUPPLEMENTAL RECORD ON APPEAL Volume I including Petition, Response and Order re Atty Escott's withdrawal as counsel, to Court of Appeals, Richmond, Virginia.

DATE	PROCEEDINGS

8/19/75 Fil. & Ent. PETITION of MRS. DOROTHY MacDONALD for Transcript of her Grand Jury Testimony; w/Cert. of Service; 1 copy. Copy to J. Dupree.

8/19/75 Fil. & Ent. PETITION of MRS. JUDITH ALVEY for Transcript of her Grand Jury Testimony, w/Cert. of Service; 1 copy. Copy to J. Dupree.

8/19/75 Fil. & Ent. the following Mar's returns:

Subpoena to Produce Doc. to *Manager, First Citizens Bk & Tr. Co.*, Fort Bragg, and to *Registrar or Clerk of Medical Records*, Chicago Wesley Memorial Hospital, 250 E. Superior St., Chicago, Ill., RETURNED UNEXECUTED at request of the U.S. Attorney.

Subpoena exec. 8/11/72 on *Hilyard O. Medlin* at Augusta, Georgia;

" " 8/12/75 on *Jeffrey Bronstein* at San Francisco, Calif.;

" " 8/12/75 on *Terry Laber*, at St. Paul, Minn.;

" " 8/12/75 on *Craig S. Chamberlin* at Champaign, Ill.; and

" " 8/13/75 on *George Gammel* at Columbia, Missouri.

8/22/75 Fil. & Ent. RESPONSE to Motion of MRS. DOROTHY MacDONALD for transcript of Grand Jury Testimony, w/Cert. of Service; 1 copy. COPY to J. Dupree.

8/22/75 Fil. & Ent. RESPONSE to Motion of MRS. JUDITH ALVEY for transcript of Grand Jury Testimony, w/Cert. of Service; 1 copy. COPY to J. Dupree.

DATE	PROCEEDINGS

8/25/75 Fil. & Ent. the following Mar's returns:

Subpoena to Testify: Exec. 8/14/75 by service on *Pirtia Styles*, Sec. to Mile Hoffman, Chief of Forensix Lab., Bureau of Alcohol, Tobacco & Firearms, IRS Bldg., 1111 Constitution Ave., N.W., Washington, D.C.;

Subpoena to Testify: Exec. 8/19/75 by service on *Richard D. Tevere*, 825 Madison Ave., NY.C.; and

Subpoena to Produce Doc.: Exec. 8/19/75 by service on *Mr. Tuxbury*, at 622 W. 168th St., New York, N.Y.

9/4/75 Fil. & Ent. the following Mar's returns:

Subpoena to Testify: Exec. 8/11/75 by service on *Dr. Martin Lonky*, personally, at 3546 Carriage Hill Cir., Randallstown, Maryland;
Exec. 8/11/75 by service on *Violet Kalin*, personally at 7714-B Ray St., Ft. Meade, Maryland; and
Exec. 8/12/75 by service on *John W. Chester*, 1010 St. Paul St., Baltimore, Md.

9/4/75 MAILED SUPPLEMENTAL RECORD ON APPEAL—VOLUME *VI*, consisting of the pretrial Exhibits, to Court of Appeals, Richmond, Virginia.

9/10/75 MAILED SUPPLEMENTAL RECORD ON APPEAL—VOLUME VII, consisting of the transcript of Hearing Upon Motions of Defendant before The Honorable F. T. Dupree, Jr., Vol. 1, Pages 1 through 587, filed Sept. 10, 1975, to Court of Appeals, Richmond, Virginia.

9/10/75 Fil. and Ent. TRANSCRIPT OF HEARING UPON MOTIONS OF DEFENDANT BEFORE The Honorable F. T. Dupree, Jr., Vol. 1, Pages 1 through 587, orig. only Forwarded to Fourth Circuit Court of Appeals.

DATE	PROCEEDINGS

9/10/75 Fil. & Ent. Mar's return on Subpoena to Testify: Return *unexecuted* per authority of AUSA—*not served* on Rebecca J. Cohen, 1811 Maness Court, Sycamore, Ill.

A True Copy, Teste:
John B. Whitty
Clerk

By /s/ Bonnie Bunn Perdue
Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

No. 75-26-CR-3

UNITED STATES OF AMERICA

v.

JEFFREY R. MACDONALD

INDICTMENT

(18, U.S.C., Sec. 1111)

The Grand Jury charges:

FIRST COUNT

That on or about the 17th day of February, 1970, at Fort Bragg, North Carolina, upon lands acquired for the use of the United States and under the exclusive jurisdiction thereof, and within the Eastern District of North Carolina, JEFFREY R. MacDONALD, with premeditation and malice aforethought, murdered Colette S. MacDonald by means of striking her with a club and stabbing her, in violation of the provisions of Title 18, United States Code, Section 1111.

SECOND COUNT

That on or about the 17th day of February, 1970, at Fort Bragg, North Carolina, upon lands acquired for the use of the United States and under the exclusive jurisdiction thereof, and within the Eastern District of North Carolina, JEFFREY R. MacDONALD, with premeditation and malice aforethought, murdered Kimberly K. MacDonald, by means of striking her with a club and stabbing her, in violation of the provisions of Title 18, United States Code, Section 1111.

THIRD COUNT

That on about the 17th day of February, 1970, at Fort Bragg, North Carolina, upon lands acquired for the use of the United States and under the exclusive jurisdiction thereof, and within the Eastern District of North Carolina, JEFFREY R. MacDONALD, with premeditation and malice aforethought, murdered Kristen J. MacDonald by means of stabbing her, in violation of the provisions of Title 18, United States Code, Section 1111.

A TRUE BILL

/s/ [Illegible]
Foreman

/s/ [Illegible]
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA FAYETTEVILLE DIVISION

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

JEFFREY R. MACDONALD, DEFENDANT.

No. 75-26-CR-3

NOTICE OF APPEAL

The Defendant in the above-captioned matter hereby gives Notice of Appeal of the Order of the United States District Court for the Eastern District of North Carolina, Dupree Jr., J., entered July 29, 1975, entitled "Order On Defendant's Remaining Pre-Trial Motions."

/s/ Bernard L. Segal
BERNARD L. SEGAL

/s/ Durant Williams Escott
DURANT WILLIAMS ESCOTT

Suite 220, 536 Mission Street
San Francisco, Ca. 94105

412 Law Building
Charlotte, N.C. 28202

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA FAYETTEVILLE DIVISION

CRIMINAL NO. 75-26-CR-3

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

JEFFREY R. MACDONALD, DEFENDANT.

MOTION TO DISMISS INDICTMENT FOR DENIAL OF RIGHT TO SPEEDY PROSECUTION AND TRIAL

The defendant, JEFFREY R. MacDONALD, respectfully moves this Court, pursuant to the Constitution and laws of the United States and to Federal Rule of Criminal Procedure 48, to dismiss the indictment against him because of the denial of his right to speedy prosecution and trial. In support of the said motion the defendant alleges as follows:

1. In February, 1970, the defendant, a medical doctor, was serving in the United States Army, attached to the Sixth Special Forces Group, at Ft. Bragg, North Carolina.

2. On February 17, 1970, the defendant's wife, COLETTE, and his two daughters, KRISTEN, age 3, and KIMBERLEY, age 6, were murdered, and the defendant stabbed and wounded by a group of intruders in the defendant's home, located on Ft. Bragg, North Carolina.

3. After the Army investigation failed to locate the perpetrators of the said crime, the Army, in April, 1970, caused the defendant to be arrested and charged with the murder of his family.

4. Pursuant to the Uniform Code of Military Justice (UCMJ) the charges against the defendant were submitted to an officer appointed pursuant to Article 32 of the UCMJ. The said officer conducted judicial proceedings

from June through September, 1970, including four full weeks of testimony in Court.

At all times throughout the said proceedings the Government was represented by counsel. The defendant was present at all times throughout these proceedings and was represented by counsel.

5. The Government presented all of the evidence known to it and which had been assembled as a result of the efforts of more than one hundred military and civilian law enforcement investigators. The said investigators had assembled evidence from several thousand witnesses in various countries throughout the world.

6. All physical evidence that had been obtained by the Government was subjected to intensive examination at the criminal investigation laboratories of the Provost Marshal General of the United States Army, located at Ft. Gordon, Georgia. The said evidence was also examined by other experts retained by the Government.

7. The Government called twenty-seven (27) witnesses in its case-in-chief against the defendant and in rebuttal to defense testimony.

8. The defendant offered a full defense to the charges against him at the said proceedings. He testified at length under oath and was subjected to a full and searching cross-examination by counsel for the Government. The defendant was also examined extensively by the Court itself.

9. The defendant called twenty-nine (29) witnesses on his behalf.

10. The Government was required by the Court to present all the evidence known to it in support of the charges against the defendant, and it did so.

11. In September, 1970, following the conclusion of these proceedings the Court made only two findings:

(a) The charges against the defendant were false.
(b) That the Government should pursue the investi-

gation of another named individual as a suspect in the murders of the MacDonald family and the assault on the defendant.

12. The conclusions of the presiding officer at the Article 32 proceedings were submitted to Major General Edward Flanagan, Commanding General of the John F. Kennedy Center for Special Warfare and U.S. Army Special Forces. The said conclusions were subjected to a full, independent judicial review by General FLANAGAN.

13. In October 1970 General FLANAGAN entered an order dismissing finally and with prejudice the charges against the defendant brought by the Government.

14. The order of General FLANAGAN dismissing with prejudice the charges against the defendant was subjected to an additional independent judicial review by Lt. General JOHN J. TOLSON, Commanding General of the XVIII Airborne Corps, Fort Bragg, North Carolina. Following the review by General TOLSON, he concurred in the adjudication by General FLANAGAN and affirmed the dismissal of the charges against the defendant.

15. On December 5, 1970, the defendant was Honorably Discharged from the Army.

16. From January, 1971, to January, 1972, the Criminal Investigation Division (CID) of the United States Army conducted what it contends was a complete, extensive and thorough reinvestigation of the murders of the MacDonald family.

17. In early 1972, the CID requested the United States Attorney for the Eastern District of North Carolina to seek an indictment of the defendant for the murders of his family.

18. The said United States Attorney failed, refused and neglected to seek an indictment in the said matter and took no substantive action on the requests for the indictment.

19. The defendant is advised, believes and therefore avers that in early 1972 the CID requested the Depart-

ment of Justice to direct that an indictment be sought against the defendant in the Eastern District of North Carolina.

20. From early 1972 until July, 1974, the Department of Justice failed, refused and neglected to act on the request of the Army to seek an indictment of the defendant. During the said period the Department of Justice took no substantive action on the request to proceed against the defendant. Further, no legally valid reasons existed for the delay in instituting any action against the defendant, except that there was no evidence to support such an accusation.

21. From early 1972 until July, 1974, the Department of Justice received requests from the defendant and from other persons that a final decision be made in regard to proceeding with the accusations against the defendant, including a speedy trial if he was to be accused.

22. On January 10, 1974, CARL W. BELCHER, Chief of the General Crimes Section, Criminal Division, Department of Justice, stated in writing that:

> ". . . the evidence currently available in this case is insufficient to warrant prosecution against Dr. MacDonald at this time."

23. From January 10, 1974, the date of BELCHER's statement, until August 12, 1974, when the Grand Jury was empaneled which subsequently indicted the defendant, the Government obtained no additional new evidence against the defendant.

24. Despite the conclusion of Government Attorney BELCHER on January 10, 1974, the Department of Justice in July of 1974 instituted proceedings to have the accusation against the defendant submitted to the Grand Jury for the Eastern District of North Carolina which was to be empaneled August 12, 1974.

25. The decision of the Department of Justice on July, 1974, to submit the accusations against the defendant and seek an indictment of him before the Grand Jury was made as the result of pressures on the Department of

Justice from outside sources and not because any new evidence had become available to the Government.

26. The conduct of the proceedings before the Grand Jury from August 12, 1974, through January 24, 1975 were needlessly and negligently delayed by the Government in total and complete disregard of the defendant's right to a speedy disposition of the charges against him and of his right to a speedy trial.

27. The Government, by its own admission, obtained no new evidence against the defendant from September, 1970, until the commencement of the Grand Jury proceedings on August 12, 1974.

The Government, by its own admission, presented no new evidence to the Grand Jury.

The Government, by its own admission, has conceded that the only difference between the initial proceedings against the defendant in 1970 and the proceedings before the Grand Jury was that the physical evidence collected by the Government in 1970 was "reinterpreted" by Government technicians.

28. The physical evidence referred to above was available to the Government at all times from February 17, 1970 through January 24, 1975.

The technicians who reinterpreted the physical evidence were available to the Government at all times since February 17, 1970.

29. The failure, refusal and neglect of the Government to submit the said physical evidence for such interpretation from 1970 to 1975 was the result of negligence, incompetence and indifference on the part of the Government to the constitutional rights of the defendant.

30. The evidence that was used by the Government to obtain the present indictment, and that will be used against the defendant at his trial, together with the witnesses who will be called by the Government, have been known and available to the Government at all times in the years 1970, 1971, 1972, 1973, 1974, and 1975.

31. The United States Army and its Criminal Investigation Division have been in charge or actively connected with the investigation of the murders of the MACDONALD family from February 17, 1970, through the indictment of the defendant on January 23, 1975, to the present time.

32. The Federal Bureau of Investigation was actively participating in and connected with the investigation of the murders of the MACDONALD family in February and March of 1970, and throughout the Grand Jury proceedings in this case. The FBI was available at all times from March, 1970 until July, 1974, to assist in the said investigation if it had been requested to do so by the United States Army, the Criminal Investigation Division of the Army or the Department of Justice.

33. The failure of the Government to act to bring the defendant to trial until more than five years have elapsed since the criminal proceedings were initiated against him in April, 1970, under the circumstances set out herein, constitute a denial of the rights of the defendant to a speedy trial, as guaranteed by the Sixth Amendment, and to due process of law, under the Fifth Amendment to the Constitution of the United States.

34. No other relief than the dismissal of the indictment can vindicate the defendant's rights to a speedy trial, and to due process of law, which rights attached when the criminal proceedings in this matter were initiated against the defendant in April, 1970.

WHEREFORE, the defendant prays that Honorable Court order the above-captioned indictment against the defendant be dismissed.

Dated: April 5, 1975

/s/ Bernard L. Segal
BERNARD L. SEGAL

Suite 220, 536 Mission Street
San Francisco, California 94105

/s/ Durant Williams Escott
DURANT WILLIAMS ESCOTT
Attorneys for the Defendant

412 Law Building
Charlotte, North Carolina 28202

AFFIDAVIT

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN FRANCISCO)

BERNARD L. SEGAL, ESQ., being duly sworn according to law, deposes and says that he is the attorney for the defendant in the foregoing Motion, that he has represented the defendant throughout the five (5) years of the proceeding which has resulted in the above-captioned indictment, and that the facts set forth in the within Motion are true to the best of his knowledge, information and belief.

/s/ Bernard L. Segal
BERNARD L. SEGAL

Sworn to and subscribed before me this 4th day of April, 1975.

/s/ Jack D. Franke
Notary Public in and for the County
of San Francisco, State of California

My Commission Expires: June 16, 1977

CERTIFICATE OF SERVICE

I hereby certify that on April 6, 1975, a copy of the foregoing Motion was sent by Airmail, Certified Delivery, to:

The Honorable Thomas P. McNamara
United States Attorney
Eastern District of North Carolina
Post Office 26897
Raleigh, North Carolina 27611

Attention: Mr. James T. Stroud, Jr.,
Assistant United States Attorney

DATED: April 6, 1975, at San Francisco, California.

/s/ Bernard L. Segal
BERNARD L. SEGAL

IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

Criminal Case No.: 75-26-CR-3

UNITED STATES OF AMERICA, PLAINTIFF

v.

JEFFREY R. MACDONALD, DEFENDANT

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS INDICTMENT FOR DENIAL OF RIGHT TO SPEEDY PROSECUTION AND TRIAL

Bernard L. Segal

536 Mission Street
Suite 220
San Francisco, Ca. 94105

Durant Williams Escott

412 Law Building
Charlotte, N.C.

Attorneys for Defendant

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I. THE DEFENDANT'S CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL HAS BEEN DENIED BY THE UNREASONABLE AND UNNECESSARY DELAY IN BRINGING AN INDICTMENT AGAINST HIM.

A. *Purpose and Scope of the Sixth Amendment.*

The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . ." In *Klopfer* v. *North Carolina*, 386 U.S. 213, 18 L. Ed. 2nd 1, 87 S.Ct. 988 (1967), the United States Supreme Court held that the right to a speedy trial was a fundamental right designed to protect every citizen of every state. In holding that the States were bound, under the Fourteenth Amendment, to enforce the Sixth Amendment, the Supreme Court said:

> "We hold here that the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment. That right has its roots at the very foundation of our English Law heritage. Its first articulation in modern jurisprudence appears to have been made in Magna Carta (1215), wherein it was written, 'We will sell to no man, we will not deny or defer to any man either justice or right, . . .' The history of the right to a speedy trial and its reception in this country clearly establish that it is one of the most basic rights preserved by our Constitution." Id., 386 U.S. at PP. 223, 226; 18 L.Ed. 2d at pp. 8, 9.

The right to a speedy trial guarantees that a criminal defendant will not be forced to suffer prolonged pretrial anxiety over public accusation and the possibility that his defense will be hindered by a long delay. This purpose was recognized by the Supreme Court in *U.S.* v. *Ewell*, 383 U.S. 116, 15 L.Ed. 2d 627, 86 S.Ct. 773 (1966) when it said:

> "This guarantee is an important safeguard to prevent undue and oppressive incarceration prior to

trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself." Id., 383 U.S. at p. 120, 15 L.Ed. 2d at p. 630.

The speedy trial guarantee must take into account the other constitutional safeguards afforded to a criminal defendant. Therefore, an exact time limit is not set for every stage of criminal proceedings. However, lack of a definite time limit is not a license for unreasonable and unnecessary delay. On the contrary, a criminal prosecution must move ahead with deliberate speed; and unaccountable lag in prosecution violates the defendants' Sixth Amendment right. The requirement was articulated by the Supreme Court in *U.S.* v. *Ewell, supra.*

> "In large measure because of the many procedural safeguards provided for an accused, *the ordinary procedures for criminal prosecution are designed to move at a deliberate pace.* A requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself." *U.S.* v. *Ewell, supra,* 383 U.S. at p. 120, 15 L.E 2d at p. 631. (Emphasis added.)

The "deliberate pace" of a criminal prosecution required by the Supreme Court's interpretation of the right to a speedy trial is self-explanatory. By its terms it requires that every stage of prosecution be advanced to without undue delay. A prosecution cannot be slowed except to protect the constitutional rights of the defendant. Any unaccounted for delay contravenes the purpose of the Sixth Amendment. It violates the defendant's right to a speedy trial by exposing him to actual or constructive incarceration, prolonged anxiety and public ignominy and the possibility of an impaired ability to defend himself.

A determination as to whether the defendant has been denied his right to a speedy trial must be based on the facts of the particular case. If the charges are stale and the defendant is put in the untenable position of having to disprove his guilt the court must recognize that the defendant's right to a speedy trial has been denied through prosecutorial inaction and the defendant has been prejudiced thereby. The Supreme Court noted that such a situation is contrary to the law in criminal prosecutions:

> "The right to a speedy trial is not a theoretical or abstract right but one rooted in hard reality in the need to have charges promptly exposed. If the case for the prosecution calls on the accused to meet charges rather than rest on the infirmities of the prosecution's case, as is the defendant's right, then the time to meet them is when the case is fresh. Stale claims have never been favored by the law, and far less so in criminal cases." *Dickey* v. *Florida,* 398 U.S. 30, 37, 26 L.Ed. 2d 26, 32, 90 S.Ct. 1564 (1970).

Against the background of the scope and purpose of the Sixth Amendment right to a speedy trial, this court is presented with the unique facts of the case at bar. The record discloses that in this case prosecution was delayed for four-and-a-half years by the Government. There was no valid reason for the delay. The only ascertainable reason for the delay is Government indifference to the defendant's constitutional right to a speedy trial and negligence in the pursuit of its duty to prosecute cases at a deliberate speed.

Because of this needless and unreasonable delay, the defendant in the present case, Dr. Jeffrey MacDonald has suffered prolonged anxiety caused by the unresolved public accusation of a heinous crime, the murder of his wife and two small daughters.

Dr. MacDonald's ability to defend himself has been impaired by the long delay since many of his witnesses are scattered far from the scene of the offense and their memories of the events have been clouded by the passage of time.

And, Dr. MacDonald has been under a "constructive imprisonment" in that his ability to freely travel outside this country or freely travel within this country without

being considered a fugitive has been severely, if not completely, curtailed by the possibility of having serious charges filed against him at any time.

By all of its inaction, the defendant's right to a speedy trial has been denied to him by the Government. The only remedy for such a denial is dismissal of the charges against the defendant. As will be seen in the following sections, the defendant's right to a speedy trial had attached in April, 1970. The criteria for determining whether that right has been denied show a manifest denial of that right and that dismissal of the charges against the defendant is the only remedy available to rectify such unconstitutional conduct.

B. *The Defendant's Right to a Speedy Trial Attached to His Arrest in April, 1970.*

1. *Arrest By the Army Began the Prosecution*

As a result of an investigation by the United States Army Criminal Investigation Division (CID) and the Federal Bureau of Investigation (FBI), the defendant, Dr. Jeffrey MacDonald, was arrested by the Army and charged under the Uniform Code of Military Justice with the murders of his wife and his two daughters in April, 1970. The arrest occurred two months after the February 17, 1970 murders of his family and the assault on himself.

Since the murders were committed on Federal lands, the Federal Government has exclusive jurisdiction over the prosecution of the offense. Since the particular Federal land is an Army installation, Ft. Bragg, North Carolina, the Army had primary jurisdiction over prosecution of the offense. However, concurrent jurisdiction is shared with the Department of Justice. If, for some reason, the Army had not proceeded with the prosecution of the offense, the Department of Justice would be required to carry out that duty.

Both the Department of Justice and the Department of the Army are departments of the Executive Branch of the United States' Government. Both the FBI and the

CID, which initially investigated the offense, are parts of the Executive Branch of the Government: the FBI is part of the Department of Justice; the CID is part of the Department of the Army. The relationship between the Department of Justice, the Army and their respective investigative division, as well as the nature of the Federal enclave jurisdiction, clearly indicates a monolithic governmental structure in this case. The Army's initial acceptance of jurisdiction was merely a matter of administrative convenience. The Department of Justice had broad prosecutorial jurisdiction and responsibility in this case from the outset. This is further confirmed by the CID's request that the Justice Department continue prosecution of the case against Dr. MacDonald after his Army discharge.

The arrest of an accused by one agency of the Government is the beginning of a single prosecution. It does not matter that the prosecution is later shifted from one agency and continued under the auspices of another. It nevertheless remains part of an on-going prosecution. In the present case, the arrest of Dr. MacDonald in April, 1970 was the beginning of the Government's prosecution of the murder charge and it was the time at which the defendant's right to a speedy trial attached.

The United States Supreme Court held, in *U.S.* v. *Marion*, 404 U.S. 307, 30 L.Ed. 2d 468, 92 S.Ct. 455 (1971), that a defendant's right to a speedy trial becomes effective upon his being *accused* of a crime, whether by arrest or by formal charge. The Supreme Court noted that:

> "On its face, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution. These provisions would seem to afford no protection to those not yet accused, nor would they seem to require the Government to discover, investigate, and accuse any person within any particular period of time. The Amendment would appear to guarantee to a criminal defendant that the Government will move

with the dispatch that is appropriate to assure him an early and proper disposition of the charges against him." *Id.*, 404 U.S. at p. 313, 30 L.Ed. 2d at p. 474.

It is significant that the Supreme Court does not specify which department of the Government carries on the prosecution nor which department "accuses" the defendant. It is sufficient, for speedy trial purposes, that the Government accuse a person of a crime. Later in the same opinion the Supreme Court confirmed this by declaring:

> ". . . it is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.
>
> Invocation of the speedy trial provision thus need not await indictment, information, or other formal charge." *U.S.* v. *Marion, supra.*, 404 U.S. at pp. 320-321, 30 L.Ed 2d at p. 479.

This is the only possible reasoning in light of the harms that the speedy trial provision is meant to prevent. If the court were to find that Dr. MacDonald's right to a speedy trial did not attach until his 1975 indictment by the grand jury, this court would be in conflict with the Supreme Court's holding that arrest itself causes the anxiety and ignominy which the Sixth Amendment is meant to prevent. The Supreme Court declared that:

> ". . . the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety to him, his family and his friends." *U.S.* v. *Marion, supra.*, 404 U.S. at p. 320, 30 L.Ed. 2d at p. 478.

There can be no doubt that the defendant in the present case was subjected to each and every one of these impositions when he was arrested on a charge of murder in April, 1970. It is of no import that he was arrested by one government agency rather than another. The curtailment of his liberty the anxiety and public ignominy and the disruption of his daily life was no less because he was arrested by the Army rather than by the Justice Department.

Because the government agencies had concurrent jurisdiction over the crime and because the defendant suffered the ignominy of arrest on a murder charge the defendant's Sixth Amendment right to a speedy trial attached at the time of that arrest in April, 1970. The unnecessary and unreasonable delay in pursuing the prosecution after that date violates the defendant's right to a speedy trial. The Justice Department's failure to seek an indictment from December, 1971 to January, 1975 denied defendant his right to a speedy trial on the murder charge against him. This denial requires the court to dismiss the indictment against the defendant, forever barring prosecution of the murder charge.

2. *Justice Department's Failure to Complete the Prosecution Violated Defendant's Right to a Speedy Trial.*

The charge of murder against the defendant was found to be false by the presiding officer at the Article 32 hearing conducted under the Uniform Code of Military Justice. The Article 32 hearing was lengthy and comprehensive. The presiding officer heard extensive testimony from both the Government and the Defense. The results of the investigations by the CID and the FBI were before the presiding officer. All the evidence available to both sides at the proceeding was presented to and examined by that officer. On the basis of that evidence, the presiding officer concluded that the charges against the defendant were false and that investigation should be aimed at another specified individual. The finding was upheld by two com-

manding officers whose duty it was to review the findings of the Article 32 court. They ordered the charges against the defendant dismissed finally.

After the findings were affirmed and the defendant was honorably discharged from the Army, the CID conducted a second year-long investigation of the murders. No new evidence was uncovered and the case remained as it had been presented at the Article 32 hearing. The Justice Department's jurisdiction over the offense did not end with the defendant's discharge from the Army. The CID presented its report to the Justice Department and requested an indictment be sought against the defendant on the murder charge. The Justice Department refused to indict.

When the defendant requested a disposition of the case on numerous occasions from early 1972 to July, 1974, the Justice Department declined to pursue an indictment against the defendant.

On January 10, 1974, the chief of the Justice Department Criminal Division stated in writing that there was insufficient evidence to warrant prosecution of Dr. MacDonald.

In August, 1974, with no more evidence than had been available the preceeding January, the Justice Department presented the case to the Grand Jury. An indictment against the defendant was returned in January, 1975.

Four years had passed from the time the defendant was discharged from the Army and the time the indictment was returned against him. Three years had passed from the time the CID had requested an indictment and the time the indictment was returned.

No reason for the long delay is apparent. The only possible explanation for the delay, short of indifference and negligence, might be a claim of prosecutorial discretion in initiating the indictment proceedings against an accused. Such a claim is without merit. The Justice Department was not free to leisurely take its time in prosecuting the defendant after the Army's dismissal of the charge. The Justice Department's jurisdiction over the case was concurrent with the Army's and continuous. All the evidence

gathered in the case was continuously available to the Justice Department. That this was the situation is obvious from the actions of those involved. The CID did not stop its investigation at the end of the Army's inquiry. Instead it conducted another investigation to attempt to add evidence to the Justice Department's case and then requested that an indictment be sought.

The defendant repeatedly requested a decision on the case, showing that he believed and knew that the Justice Department had jurisdiction over his case even without a separate action or investigation of its own. The Justice Department's answer, relying on the evidence presented by the CID, indicates its involvement from the initial investigation and its right to institute further proceedings in the prosecution.

Based on the situation as perceived by all involved, and in light of the Army's commencement of prosecution, the Justice Department had no right to refuse to continue expeditiously to prosecute the case. Nor was there any prosecutorial discretion to indefinitely delay prosecution based on the same evidence presented in the Army's Article 32 hearing.

The United States Supreme Court has ruled that the exercise of prosecutorial discretion in situations similar to the present case denies the defendant his right to a speedy trial.

In *Klopfer* v. *North Carolina*, *supra*, the defendant was indicted for criminal trespass and was promptly tried. However, the jury could not reach a verdict so the trial judge declared a mistrial and ordered the case continued. The county attorney gave notice of his intention to file a nolle prosequi with leave. The defendant objected but the court agreed. After another continuance, the defendant requested "to have the charge pending against him permanently concluded in accordance with the applicable laws of the State of North Carolina and of the United States as soon as is reasonably possible." *Id.*, 386 U.S. at p. 218, 18 L.Ed 2d at p. 5. But, even though no justification for the nolle prosequi was given and in spite of the defendant's objection, the trial court grants the State's motion.

On appeal the North Carolina Supreme Court held that the defendant had a right to a speedy trial "if there is to be a trial." But the prosecutor's discretion determined whether or not a trial would take place. The State Court declared:

> "However, we do not understand the defendant has the right to compel the State to prosecute him if the state's prosecutor, in his discretion and with the court's approval, elects to take a nolle prosequi. In this case one jury seems to have been unable to agree. The solicitor may have concluded that another go at it would not be worth the time and expense of another effort" quoted in *Klopfer* v. *North Carolina, supra,* 386 U.S. at p. 219, 18 L.Ed. 2d at p. 6.

The United States Supreme Court, in a decision which resulted in the application of the speedy trial right to the States through the due process clause reversed the North Carolina Court. The Supreme Court first noted that the nolle prosequi with leave has the effect of giving the defendant his physical freedom without a requirement to appear in court at a later date. However, the nolle prosequi does not dismiss the charge, it merely postpones further prosecution at the discretion of the prosecutor. The defendant is denied the opportunity to exonerate himself at trial if the prosecutor decides not to try the case. And during that unlimited discretionary period, there is no means by which the defendant can obtain a dismissal or have the case put on the trial calendar. In *Klopfer, supra.* the Supreme Court found that the procedure violated the defendant's right to a speedy trial because it subjected him to the very impositions which the speedy trial clause sought to prevent. The Supreme Court found that:

> "The petitioner is not relieved of the limitation placed upon his liberty by the prosecution merely because its suspension permits him to go 'withersoever he will'. The pendency of the indictment may subject him to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes. By indefinitely prolonging this oppression, as well as the 'anxiety and concern accompanying public accusation,' the criminal procedure condoned in this case by the Supreme Court of North Carolina clearly denies the petitioner the right to a speedy trial which we hold is guaranteed to him by the Sixth Amendment of the Constitution of the United States." *Id.*, 386 U.S. at pp. 221-222, 18 L.Ed. 2d at p. 7.

The defendant has moved, in a separate motion to which briefs have been filed, for the dismissal of the indictment against him on the basis that it is barred by the double jeopardy clause of the Constitution, and the doctrine of collateral estoppel. He presses that motion most vigorously. But, assuming arguendo, that the Court should ultimately reject that view, the impact of the *Klopfer* case must then be considered as it touches upon the defendant's speedy trial rights here.

In such a situation, the effect of the Justice Department's failure to pursue an indictment against the defendant in the present case is the same as that produced by the nolle prosequi with leave in *Klopfer.* Here the defendant has been tried on the murder charge and discharged from it by the Army. However, because of the Justice Department's concurrent and continuing jurisdiction over the offense, the defendant, although not in custody, was not free from further prosecution. The Justice Department could initiate proceedings to obtain an indictment against the defendant at any time. In spite of repeated requests to take some action on the charge, the Justice Department chose, for no valid reason to postpone action until three and one-half years after the defendant's discharge from the Army. During that time, although the defendant was free of physical custody he labored under the impositions of an unresolved charge of murder. The right to a speedy trial guarantees that a defendant will be free of these impositions as soon as possible after he is publicly accused of a crime. Even prosecutorial discretion cannot deny a defendant that right. And, the fact that he is free from physical custody does not sanction use of prosecutorial discretion which denies the defendant

the opportunity to exonerate himself at the soonest possible time. The Supreme Court declared that:

> "The North Carolina Supreme Court's conclusion—that the right to a speedy trial does not afford affirmative protection against an unjustified postponement of trial for the accused discharged from custody—has been explictly rejected by every other state court which has considered the question. That conclusion has also been implicitly rejected by the numerous courts which have held that a nolle prossed indictment may not be reinstated at a subsequent term. We too believe that the position taken by the court below is erroneous." *Klopfer* v. *North Carolina, supra*, 386 U.S. at pp. 219-221, 18 L.Ed. 2d at pp. 6-7.

The exercise of discretion not to prosecute by the Justice Department in the present case had the same effect as a nolle prosqui with leave. As long as the defendant had previously been subjected to prosecution on the same charge by an agency with concurrent jurisdiction with the Justice Department, the *Klopfer* decision is clear on point. As long as the prosecuting authorities fail, in the face of repeated requests for action, to complete a prosecution already begun, the defendant has been denied this right to a speedy trial. The prosecution's actions in the present case have severely curtailed the defendant's activities and created undue anxiety and concern over the pending prosecution in the defendant, his family and friends. The defendant has also been exposed to public scorn for an unnecessary length of time due to the Government's failure to complete prosecution of the murder charge. The defendant's Sixth Amendment right to a speedy trial has been denied and the Court must dismiss the charge against the defendant.

C. *Standards Which Determine A Denial of the Right to a Speedy Trial*

1. In General

In *Dickey* v. *Florida, supra*, Justice Brennan expressed dismay that the Supreme Court had not touched on the definition of the speedy trial right in its previous opinions. And, it did not reach the question in *Dickey*. Justice Brennan noted that:

> "It is timely to note that the Court has yet given scant attention to these and other questions essential to the definition of the speedy trial guarantee. Before *Klopfer*, only three of our opinions dealt at any length with the right, and each was decided with little analysis of its scope and content. . . . *Klopfer* itself attempted no extensive analysis; . . . And today we do not consider the effect of the application of the Speedy Trial Clause to the States. Thus although we said in *Klopfer* that the right to a speedy trial is 'one of the most basic rights preserved by our Constitution, . . . a guarantee as fundamental as any of the rights secured by the Sixth Amendment,' . . . we have yet even to trace its contours." *Id.*, 398 U.S. at pp. 40-41, 26 L.Ed. 2d at pp. 34-35 (Mr. Justice Brennan concurring)

In answer to that dissatisfaction, the Supreme Court, within a period of two years decided three cases which gave a clearer definition to the speedy trial guarantee of the Sixth Amendment. In *U.S.* v. *Marion, supra*, the Supreme Court defined the scope of the right on the various stages of criminal prosecution. In *Barker* v. *Wingo*, 407 U.S. 514, 33 L.Ed. 2d 92 S.Ct. 2182 (1972), the Supreme Court articulated the test to be used in determining whether a defendant has been denied the right to a speedy trial. And, in *Strunk* v. *U.S.*, 412 U.S. 434, 37 L.Ed. 2d 56, 93 S.Ct. 2260 (1973), the Supreme Court set down the remedy for denial of the defendant's right to a speedy trial.

In *Barker* v. *Wingo*, *supra*, the Supreme Court rejected the proposal that it formulate a rule that a criminal defendant be offered a trial within a specified time limit. (Suggested by the American Bar Association Project on *Standards for Criminal Justice, Speedy Trial*, 14-16 (approved draft 1968)). The Court also rejected a strict "demand-waiver rule" which would result in automatic and permanent waiver of his speedy trial right by a defendant who fails to demand a trial. The Supreme Court declared:

> "We, therefore, reject both of the inflexible approaches—the fixed-time period because it goes further than the Constitution requires; the demand-waiver rule because it is insensitive to a right which we have deemed fundamental. The approach we accept is a balancing test, in which the conduct of both the prosecution and the defendant are weighed." *Id.*, 407 U.S. at pp. 529-530, 33 L.Ed. 2d at p. —.

But the balancing test is not a rigid test. It depends on the particular facts of the case before the Court, necessitating an "ad-hoc" approach by Courts to the speedy trial issues. Recognizing that a flexible test cannot be confined within rigid contours, the Supreme Court set down a bare outline to serve as a guideline for the lower courts when considering speedy trial issues. The Supreme Court said:

> "We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors. Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker* v. *Wingo*, *supra*, 407 U.S. at p. 530, 33 L.Ed. 2d at p. —.

Each of these factors must be examined in the particular case before the Court. After examining the specific facts presented to it, the Court must weigh the conduct of both the prosecution and the defendant. Where the prosecution's conduct has had an adverse effect on the defendant's ability to obtain a fair and speedy trial, and the defendant's conduct has not contributed to that adverse effect, the Court must find that the defendant was denied his right to a speedy trial.

2. *Particular Facts in the Case at Bar.*

The defendant in this case at bar has been denied his right to a speedy trial. The factors to be weighed in determining whether the right has been denied are balanced in favor of the defendant in the present case:

(a) The length of the delay was extraordinary;

(b) the reason for the delay was the indifference of the prosecution to the defendant's constitutional rights and the breach of the prosecution's duty to prosecute a criminal charge at a deliberate pace;

(c) the defendant's assertion of his right was clear and unequivocal. Defendant asked that the prosecution against him proceed to disposition;

(d) Prejudice to the defendant is significant in that defendant's witnesses have moved away from the site of the offense and their memories of the events surrounding the offense has been clouded by the passage of time.

i) *Length of Delay*

The delay in the present case began in December, 1970. At that time the defendant was discharged from the Army. All charges relating to the murder of his wife and two daughters were dismissed by the Army as false. Defendant was, at that time released from Army jurisdiction.

The Justice Department had concurrent jurisdiction with the Army over the offense committed against the MacDonald family. The Justice Department's jurisdiction did not end in December, 1970. If the Justice De-

partment intended to pursue the prosecution, begun by the Army in April, 1970, the Justice Department had that opportunity and duty commencing December, 1970. It also had available to it all the evidence used by the Army in its prosecution. The Justice Department's failure to promptly pursue prosecution against the defendant in December, 1970 triggered a delay which lasted until January, 1975 when the defendant was indicted.

In a prosecution of such a serious nature, a triple murder, a four-year delay is extraordinary. A presumption of prejudice arises from such a delay of such length when the Court recognizes that no further evidence was gathered in the case from September, 1970 through January, 1975. And, from early 1972 to at least July 1974 no investigative work was done on the case. To allow a serious charge such as the one at bar to lie without investigation or prosecution for a four-year period creates a delay in the prosecution of the charge which weighs heavily against the Government in a consideration of its conduct of the case.

Even if the Court were to conclude that the delay did not begin with the defendant's discharge from the Army, it must find that the delay began when the CID finished its reinvestigation of the murders in January, 1972 and requested an indictment against defendant. At this point, the prosecution was put on notice that all the evidence available in the case had been gathered and was at its disposal. Failure to act on this notice triggered a delay which lasted three years. Since no further work on this serious charge was done after the CID request, the length of the delay is presumptively prejudicial and must weigh against the prosecution in the present case.

The Supreme Court said in *Barker* v. *Wingo*, *supra*, that the length of the delay is the factor which puts the entire determining process into action:

> "The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious complex conspiracy charge." *Id.*, 407 U.S. at pp. 530-531.

It is clear that the case at bar is an extraordinarily serious and complex one. However, under *Barker*, the Court would not disapprove such a delay if it were for purposes of investigation and organization of the case. But, in the present case all investigation had been completed by the CID and the FBI prior to the Article 32 hearing. In fact, all the evidence had been marshalled and organized for that proceeding. The Justice Department had the bulk of its work done for it by September, 1970 when the Article 32 hearings were completed. Even allowing an extra year for CID reinvestigation of the case, the Court must find the length of the delay and the absence of any further action on the case during that period was an inordinate occurrence for so serious a matter.

Since no new evidence was discovered upon reinvestigation the prosecution should have gone foreward in early 1972 if it was warranted. Instead, the Justice Department waited, for no ascertainable reason, until August, 1974 to begin presenting its case to the Grand Jury. Although the Government contends that the MacDonald case was under investigation at all times, the record indicates no new evidence after September, 1970 and no actual investigation after January, 1972. Based on the record, therefore, the Government's assertions appear to be no more than the routine pronouncements of every law enforcement agency regarding its unsolved crimes: "The matter is still under investigation."

However well these assertions of ongoing investigations may appease the public or the press, they cannot be seen as an explanation for the denial to right to a speedy trial. At some point in time an investigation must be completed. In this case it was at least after the 1971-1972 reinvesti-

gation furnished no new evidence. To allow a prosecution to become stale while the Government sits on its collective hands is to effectively deny an accused the right to a speedy trial. One court has said that staleness of criminal cases reflects on the whole system of criminal justice:

> The United States Attorney has a duty to press criminal cases to trial, to give them any necessary priority, and to prevent, whenever possible, even the suggestion of staleness. And the trial court, which is the neutral arbiter for the defense as well as the prosecution, must do all it can to keep its criminal dockets current. . . . A staleness suggestion, which has any justification for its utterance, reflects on the court itself and on the administration of federal justice." *Hodges* v. *United States*, 408 F. 2d 543, 551 (8th Cir. 1969).

The trial courts in the District of Columbia have kept a vigilant watch on potentially stale cases by subjecting to close scrutiny those where more than one year has elapsed from arrest to trial. When such a case comes before the court, the Government must show that the delay was justified and that no prejudice was caused to the defendant. As the delay increases the Government's burden is heavier:

> "A delay of over one year between arrest and trial raise a Sixth Amendment claim of 'prima facie merit." It places on the government the necessity of justification, the burden of which increases with the length of the delay. When the delay approaches a year and a half as in this case, the Government must provide a justification which convincingly outweighs the prejudice which can normally be assumed to have been caused the defendant." *U.S.* v. Rucker, 464 F.2d 823 (1972); *U.S.* v. *Bradley*, —— F.2d (Cr. No. 73868, November 27, 1974).

The delay in the present case has caused the trial to occur more than five years after the offense and arrest. At least two and one half of those years entailed unjustified and unnecessary prosecutorial delay. Therefore, the court should carefully scrutinize that period and require the Government in the present case to bear the burden of showing justification for the delay which convincingly outweighs the prejudice which the court can presume has been caused the defendant.

The Government has no such proof since the delay was due to its own indifference and negligence. Therefore, the length of the delay should weigh against the Government in the Court's considerations.

ii) *Reason for the Delay*

a) *Pre-Indictment Delay*

In the present case, no reason is apparent for the four year delay between the defendant's discharge from the Army after the Army dismissed the charges against him, and the Grand Jury proceedings indictment.

The defendant was at all times ready and willing to go foreward with proceedings. He neither sought to postpone any prosecution nor did he attempt to evade prosecution. The record clearly indicates that the defendant was not the cause of any delay in the present case.

On the other hand, it is the Government's duty to take cognizance of defendant's right and bring cases speedily to trial. In the present case the Government neither brought the case to trial on its own, nor did it accede to the defendant's requests that a decision be made as to the status of his case. For three and one-half years no action was taken by the Government. In spite of the Justice Department's assertions that it was "investigating" the case the record indicates that no actual investigation occurred after January, 1972, two and one-half years before the Grand Jury was convened. And the statement of Carl Belcher, Chief of General Crimes Division on January 10, 1974, that " . . . the evidence currently available

in this case is insufficient to warrant prosecution of Dr. MacDonald," supports the inference that no new evidence had been obtained over a three-year period. From the circumstances of the case, it is apparent that any delay was the result of Government indifference and negligence. This type of conduct must weigh heavily against the Government an din favor of the defendant, who tried to assert his right to a speedy trial but was thwarted by the Governments actions.

In *Barker* v. *Wingo, supra*, the Supreme Court said:

> "Closely related to the length of delay is the reason the government assigns to justify the delay. . . . A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Id.*, 407 U.S. at p. 531, 33 L.Ed.2d at p. 117.

In *U.S.* v. *Bradley, supra*, the District of Columbia trial court found that the prosecutor's constant requests for continuances were in violation of his duty to bring criminal cases to trial as well as violative of the defendant's right to a speedy trial:

> "It is clear that the delay from October 31, 1973, to December 21, 1974, was brough about by prosecution dilatoriness in presenting the case to the grand jury until the police investigation of a claim of brutality lodged by the two then misdemeanor defendants against the complainant officers was completed. At that point only Mr. Bradley was awaiting grand jury action, and the delay in presenting his case is unexplained . . . In light of the burden which the government bears, the lack of a satisfactory explanation leads the court to conclude that no justification exists for that delay; . . ." *U.S.* v. *Bradley, supra*, 103 Wash. Law Rptr. at p. 167, —— F.2d at p. ——.

The same unexplained delay is present in the case at bar. The Government, which bears the burden of bringing cases to trial, must bear the burden of explaining the delay. No reason but indifference and negligence appears for the failure to prosecute the case.

In *Barker* v. *Wingo supra*, the Supreme Court distinguished between delays caused by deliberate oppression intended to hinder the defense. Deliberate oppression is weighed to heavily against the Government while negligent delays, although still held against the Government, carry slightly less weight.

In the present case the facts show prosecutorial conduct that goes beyond mere negligence. The prosecutors in this case received numerous letters from defendant's counsel over a period of years requesting that *some* action be taken on defendant's case. Dr. MacDonald himself went in person to the Justice Department to request that action be taken on the case. He was refused an interview with prosecutorial authorities. No action was taken by the Government in response to the defendant's requests. Failure to act in response to such requests shows an attitude of gross indifference on the part of the Government toward prosecution of defendant's case.

This type of indifference cannot be categorized under the *Barker* opinions view of negligence. Rather, such indifference, in light of the unique facts of this case, is deliberate oppression intended to hinder the defense. Were it not such deliberate oppression, the Government would have acted on the requests, at least by granting Dr. MacDonald an interview or in some way responding to his personal request for action on the case.

Had the Government not wanted to hinder the defense, it would have given some indication to defendant's counsel that the case would be ready for prosecution at some definite time, not merely "under investigation" indefinitely.

The prosecutorial conduct exhibited in the present case is clearly classified in *Barker* as purposeful and oppres-

sive. It must be weighed heavily against the Government in determining whether the defendant has been denied his right to a speedy trial.

b) *Delay in the Conduct of the Grand Jury's Proceedings*

The total indifference that the Government has manifested toward the defendant's right to a speedy trial is highlighted by the manner in which the Grand Jury proceedings themselves were conducted.

The Grand Jury was convened on August 12, 1974. It returned the indictment against the defendant on January 23, 1975, more than six months later. With the single exception of its first week, the grand jury never devoted a full week of consideration to the defendant's case, although it was clearly the primary and most important matter before it. It met sporadically, weeks often went by without the grand jury meeting or considering the defendant's case.

The defendant does not know that the precise number of witnesses who were called before the Grand Jury in connection with the investigation of the death's of his family. However, he has reason to believe that they did not exceed 20 in number. And, that only a few of them required appeared for as long as two hours.

In view of this the question must remain, why did the Grand Jury require six months before it returned an indictment against the defendant? The answer is to found in the following facts:

1. The government's principal attorney, Victor Woerheide, took a five week European vacation in September, 1974. During Mr. Woerheide's vacation, the Grand Jury's investigation into this case was suspended. This occurred despite the fact that the United States Attorney for the Eastern District of North Carolina, Mr. McNamara, and his assistant, Mr. Stroud, were available and had been present throughout the grand jury proceedings to that point.

2. Mr. Woerheide caused the Grand Jury to be recessed again in December, 1974 because there was a serious illness to an adult member of his family. This occurred despite the fact that Mr. McNamara and Mr. Stroud were available and able to conduct the proceedings before the Grand Jury.

3. Because Mr. Woerheide, who works and lives in the Washington D.C., area, insisted upon exercising personal control of every aspect of the Grand Jury's work, he refused to delegate the conduct of the grand jury proceedings to McNamara and Stroud who were in Raleigh, North Caroline at all time during the proceedings. Had he been willing to set aside his unreasonable and adamant insistence that the Grand Jury meet only when it was convenient for him to come to Raleigh from Washington, the work of the grand jury would have been concluded at a considerable earlier time.

It is perfectly clear that the lackadasical tempo of the grand jury proceedings was entirely a function of the Government's inability or unwillingness to recognize the existence of the defendant's speedy trial right and to act expeditiously accordingly.

The Court in *United States* v. *Bradley* found that repeateded continuances which cause a case to proceed "langourously through the system" is evidence of "dilatory conduct" on the part of the prosecution. Such conduct jeopardizes a defendant's right to a speedy trial and, if combined with other questionable prosecutorial conduct (overcharging in *Bradley;* gross indifference in the MacDonald case) actually does deny the defendant his right to a speedy trial. 103 Washington Law Reporter, pp. 161, 165.

The grand jury proceedings in the present case are a prime example of dilatory prosecutorial conduct which, when combined with the previous delay in prosecution, has denied the defendant his right to a speedy trial.

iii. *Defendant's Assertion of His Right*

The defendant in the present case asserted his right to a speedy trial repeatedly both in person and through

counsel. Upon his discharge from the Army the defendant went to the Department of Justice in person, accompanied by Congressman Allard Lowenstein and attempted to see Assistant United States Attorneys General Will Wilson and Henry Petersen. Defendant's intention was to seek a resolution of the murder investigation. Neither Wilson nor Petersen would address themselves to the defendant's request for a decision as to the disposition of this case.

Counsel for defendant, Bernard L. Segal and Michael Malley, both carried on correspondence with the Justice Department on the defendant's behalf. Both counsel sought to ascertain the status of defendant's case. Counsel offered to submit their client to questioning by the Justice Department so that the Government might clear up any questions it had concerning defendant MacDonald's involvement in the charged offense. Counsel's letters, which range over a two and one-half year period are addressed to a number of highly placed Justice Department officials. The answers to counsels' letters are intentionally vague and inconclusive claiming that the case was "under investigation" and that questioning of Dr. MacDonald would be premature. At no time do any of the letters state that prosecution will be continued or that further prosecution is contemplated. In view of the foregoing it is clear that the defendant amply and adequately asserted his right to a speedy trial.

Assertion of the right to a speedy trial is a consideration in determining whether a defendant has been denied his right to a speedy trial. The Surpeme Court said, in *Barker* v. *Wingo*, that:

> "The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of that right. We emphasize' that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Id.*, 407 U.S. at pp. 531-532, 33 L.Ed. 2d at pp. 117-118.

In *Barker*, *supra*, the Court found it significant that Barker did not appear to want a speedy trial. The Court

concluded that Barker was gambling on acquittal of his co-defendant in which event Barker might never be tried.

A defendant's indifference to the delays in his prosecution is significant. Likewise, another defendant's desire for a speedy trial must also be significant. The defendant in the present case made repeateded attempts to assert his desire for a speedy trial. Failure of the prosecuting authorities to act on these requests is weighed heavily against them in view of their duty to bring cases to trial at a deliberate pace.

Insofar as the defendant's request for a speedy trial was made to the prosecuting authorities, the present case is analogous to those in which prisoners held in other jurisdictions request trial in a jurisdiction where an outstanding charge is pending against them. In *Smith* v. *Hooey*, 393 U.S. 374, 21 L.Ed. 2d 607, 89 S.Ct. 575 (1969), the defendant was imprisoned in a federal prison in Kansas and had an outstanding Texas charge against him. Despite his repeated attempts for six years to be brought to trial on the outstanding charge, the Texas prosecutors took no steps to comply. The Supreme Court found that the defendant, even though imprisoned in another state, had a Sixth Amendment right to be brought to trial in Texas. Since the defendant could not initiate his own prosecution, the Court found that the Texas authorities had a duty to bring the defendant to trial upon request. The Court said:

> ". . . we hold today that the Sixth Amendment right to a speedy trial may not be dispensed with so lightly. . . . Upon the petitioner's demand Texas had the constitutional duty to make a diligent good faith effort to bring him to the Harris County court for trial." *Id.*, 393, U.S. at p. 383, 21 L.Ed. 2d at p. 614.

The Fourth Circuit Court of Appeal has applied the *Smith* principle to prisoners within its jurisdiction. In *Kane* v. *State of Virginia*, (4th Cir. 1970), 419 F. 2d 1369, the Court agreed that when a prisoner requested to be brought to trial or to have the charges dismissed was met by refusal or inaction on the part of the

prosecutors, a denial of the right to a speedy trial occurs. The remedy is dismissal:

> ". . . the district court should discharge him from custody under the detainer and bar prosecution of the charges for which it was filed." *Id.*, 419 F.2d at p. 1373

According to the Court, this sanction is in keeping with the purpose of the Sixth Amendment. It also works as a warning to prosecutors that they have a duty to bring cases to trial, especially when requested to do so by the accused. To fail in this duty is to breach the public trust since there is then a "likelihood that the prosecutor's delay will thwart the public's interest in the prompt ascertainment and punishment of the guilty." *Kane* v. *State of Virginia, supra,* 419 F 2d at p. 1371.

The prosecutors in the present case were under an even stronger compulsion to proceed with the prosecution of the defendant's case. Here, not only was the defendant not a prisoner in some other jurisdiction which would make it difficult for the authorities to bring him to trial, but he came *in person* to the Justice Department to assert his right to a speedy trial and was turned away!

If the prosecuting authorities in *Smith* and *Kane, supra,* were under a constitutional duty to make good faith and diligent efforts to comply with prisoners' requests for trial, the authorities in the present case were under at least the same constitutional duty to proceed with the defendant's case when he presented himself to them in an attempt to assert his right to a speedy trial. The Justice Department's refusal to even talk with Dr. MacDonald is clear evidence of their disinterest in bringing the matter to a speedy trial.

Not only should the defendant's assertion of his right to a speedy trial weigh heavily in his favor in the present case, but it should weigh heavily against the government in view of their actions against the defendant.

iv) *Prejudice to Defendant*

The defendant in the present case has been prejudiced by the delay in bringing his case to trial. The defendant has been personally prejudiced because he has been forced to suffer the anxiety and concern of awaiting a possible public trial on the charged offense. Since the defendant has already undergone one trial on this same charge, he is doubly prejudiced by being aware of the physical and emotional strain occasioned by trial. Forcing the defendant to anticipate a possible trial for four years has caused him anguish and unbearable suffering that the speedy trial guarantee is specifically meant to prevent.

Defendant has also been prejudiced in the preparation of his defense. The offense in the present case occurred on an Army installation in North Carolina. Many of the witnesses at the Article 32 hearing were Army personnel who have since been transferred from North Carolina to places all over the world. Had the prosecution in this case been promptly brought, many of these witnesses would still have been stationed in North Carolina and easily available to the defense.

By delaying the prosecution, the Government has made it necessary for the defendant to scour the world for his witnesses and to keep track of their whereabouts for over four years. The fact that many of these witnesses are highly mobile Army personnel has made the task of keeping track of them a difficult one. *At this juncture the defendant is no longer certain where many of his witnesses are.*

Additionally, the witnesses in this case have been removed from the vicinity of the crime, some for years. The passage of time dims memories even when witnesses are near the scene of the offense and have constant reminders of the event. In the present case, the witnesses have been removed from the place of the event and risk not only the dimming of memory but the chance that some of them will remember the events only as a dream far removed from them in time and place. This is more likely in a case of the nature of the present one where three people were brutally murdred. Witnesses are more likely

to try to forget what happened after judicial proceedings than to try to constantly recall and think about the event. The result is that the defendant has been severely prejudiced by the delay in this case in that his witnesses have been subjected to both time and events which are certain to have a deleterious effect on their ability to testify.

The Supreme Court has found this type of prejudice to be the kind that weighs in favor of a dismissal of the charges. In *Barker* v. *Wingo, supra* the Court said:

> ". . . the inability of a defendant to adequately prepare his case shews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately the events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown. . . . Finally, even if an accused is not incarcerated prior to trial, he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility." *Id.*, 407, U.S. at pp. 532-533, 33 L.Ed 2d at p. 118.

There is no doubt that Dr. MacDonald has been subject to the kind of prejudice which denies him the possibility of a fair trial at this late date. In a serious charge as is present in this case, the memory of the witnesses is all important. Even though some of their testimony is preserved in the record of the Article 32 hearing, it is prejudicial to the defendant to have to constantly remind the witnesses of their prior testimony in order to refresh their memories. A jury observing that type of procedure cannot help but adversely judge the credibility of a particular witness. The prejudice to the defendant in such circumstances is obvious and incurable by anything except dismissal of the charges.

The Court must also weigh the prejudice to the defendant caused by his inability to properly confer with his witnesses and his great difficulty in keeping track of them. In *Smith* v. *Hooey, supra*, the Supreme Court found that a prisoner's incarceration in another jurisdiction was severly prejudiced by any delay in bringing him to trial in that he could not keep track of nor properly prepare his witnesses. The Court found that the defendant was prejudiced because:

> ". . . far from the place where the offense covered by the outstanding charge allegedly took place, his ability to confer with potential defense witnesses or even to keep track of their whereabouts is obviously impaired." *Smith* v. *Hooey, supra*, 393 U.S. at pp. 379-380, 21 L.Ed.2d at p. 612.

The prejudice in the present case is no less simply because the defendant is not incarcerated. Due to the delay in prosecuting the charge, many of the witnesses available to the defendant have been placed beyond the reach or in places inconvenient for proper contact. Had the case been tried earlier, these witnesses would have been more easily available to the defense. It is clear that the disadvantage to the defendant in this case is the result of Government delay. And, therefore, the prejudice caused in this case should be weighed heavily in favor of dismissal because the defendant has been denied his right to a speedy trial.

3. *Balancing The Factors in the Present Case.*

The Supreme Court has offered guide lines to aid the trial court in coming to a proper decision in cases where denial of the right to a speedy trial is at issue. The Supreme Court has said:

> "We regard none of the four factors identified above as either necessary or sufficient conditions to the finding of a deprivation of the right of a speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But because we are dealing with a fundamental right of the accused, this process must be carried out with full

recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution. *Barker* v. *Wingo*, *supra*, 407 U.S. at p. 533, 32 L.Ed. 2d at pp. 118-119.

In each instance in the present case, the weight of the factors is clearly in the defendant's favor.

1. A delay of four years after defendant's discharge from the Army and three years after investigation was completed in obtaining the indictment is a breach of the prosecutor's duty to bring criminal cases to trial at a deliberate pace.

   No portion of this delay can be attributed to the defendant. A delay of such length, for no ascertainable reason in a case as serious as the one at bar, is presumptively prejudicial to the defendant. Therefore, the weight of this factor must be balanced in the defendant's favor.

2. There is no valid reason for the delay. Although the Government claims it was investigating the case, the record shows that all available evidence was gathered before September, 1970 and that all active investigation was completed by January, 1972.

   The Government was not only negligent in failing to proceed to trial; it was also indifferent to the defendant's rights and to the need for a prompt decision in the case. This action, or lack of it, weighs heavily against the Government in view of the nature of the case, the prior hearings on the matter and the defendant's position as a result of the charges. Therefore, the weight of this factor goes against the Government and in favor of the defendant.

3. The defendant asserted his right to a speedy trial in person and through counsel. Defendant's attempts to see Justice Department officials to ascertain the status of his case and to request that some action be taken on his case were met with silence by those officials. The defendant's counsel wrote

numerous letters to the Justice Department asking about the status of the case and what action was being taken. The answers to those letters were vague, inconclusive and evasive, saying only that the case was "under investigation." At no time did the Justice Department take any affirmative action on defendant's case in response to defendant's assertion of his speedy trial right. Therefore, this factor must weigh most heavily in the defendant's favor.

4. The defendant has been prejudiced by the delay in prosecuting his case. Because of the inaction of Government prosecutors, the defendant has lived under a cloud of anxiety and suspicion for over four years. Additionally, many of the witnesses who would have been available to defendant had the case been tried promptly are now scattered throughout the world. If is difficult, if not impossible, for the defendant to locate all of these witnesses and to keep sufficiently in contact with them to properly prepare his defense.

   The witnesses themselve have been subjected to the dimming of memory caused by passing of time, as well as their removal from the vicinity of the events, thereby making the events about which they will testify remote as to both time and place. The fact that defendant has been prejudiced both personally and in the preparation of his defense should weigh heavily in his favor in a determination of the denial of his right to a speedy trial.

The overwhelming weight of the evidence shows that the defendant has been denied his right to a speedy trial. The balance of the four determining factors is heavily weighted in defendant's favor. Therefore, the Court must find that the defendant's right to a speedy trial has been denied and the charges must be dismissed.

D. *The Only Remedy For Denial of the Right To a Speedy Trial Is Dismissal Of The Charge.*

Because the defendant in the present case has been denied his right to a speedy trial by the Government's failure to pursue the prosecution of defendant for at least two and one-half years for no valid reason, the court must dismiss the charges against the defendant. Dismissal of the charges is the only remedy available to a defendant whose right to a speedy trial has been denied.

There are few reported federal cases where courts have found that defendants have been denied their right to a speedy trial. In *United States* v. *Strunk* (C.A. 7th 1972). 467 F.2d 969, the Court of Appeal attributed the sparsity of such cases to the lower courts aversion to the severe remedy imposed when the Sixth Amendment right has been denied. The court stated:

> "The remedy for a violation of this Constitutional right has traditionally been the dismissal of the indictment or the vacation of the sentence. Perhaps the the severity of that remedy has caused the courts to be extremely hesitant in finding a failure to afford a speedy trial." Id, 467 F 2d at p. 973.

In view of this reluctance of the Court to find a denial of the rights, the Court of Appeals fashioned a remedy which was compensatory in nature, i.e., the Court remanded with instructions to credit the defendant with the period of time which had elapsed between the return of the indictment and the date of arraignment, three hundred and six days.

The United States Supreme Court granted certiorari solely on the issue of what remedy the courts should apply after finding a defendant has been denied his right to a speedy trial. In a unanimous opinion, the Supreme Court held that a compensatory remedy such as the one fashioned by the 7th Circuit Court of Appeals, no matter how flexible it might be construed, did not suit the purpose of the speedy trial right. The speedy trial right, said the Court is unique in that its denial cannot be cured as simply as can be denial of other rights. The Court said:

> "By definition, such denial (of the right to a speedy trial) is unlike some of the other guarantees of the Sixth Amendment. For example, failure to afford a public trial, an impartial jury, notice of charges, or compulsory serve can ordinarily be cured by providing those guaranteed rights in a new trial. The speedy trial guarantee recognizes that a prolonged delay may subject the accused to an emotional stress that can be presumed to result in the ordinary person from uncertainties in the prospect of facing public trial. . . .—uncertainties that a prompt trial removes." *Strunk* v. *U.S.*, *supra*, 412 U.S. 434, 439, 37 L.Ed 2d 56, 93 S.Ct. 2260 (1973)

And, the Supreme Court held that the severity of the remedy and its effect on the criminal justice system are outweighed by the need to fulfill the purpose of the speedy trial right. The Court declared:

> "It is true that *Barker* described dismissal of an indictment for denial of a speedy trial as an 'unsatisfactorily severe remedy.' Indeed in practice it means that a defendant who may be guilty of a serious crime will go free, without having been tried.' . . . But such severe remedies are not unique in the application of constitutional standards. In light of the policies which underlie the right to a speedy trial, dismissal must remain, as *Barker* noted, 'the only possible remedy.'" *Id.* 412 U.S. at pp. 439-440.

In light of the Supreme Court's holding, the court in the present case must not shirk from the finding that the defendant here was denied his right to a speedy trial simply because the court is reluctant to apply the remedy to a serious charge. Such action is disapproved of in the Supreme Court's finding that the policies behind the right require a severe remedy for denial. By implementing dismissal as the remedy, the Supreme Court has recognized that a defendant cannot be compensated by a "time credit" as fashioned by the Court of Appeal. Instead, the Supreme Court has found that time lost is irretreivable and all prosecution must be barred where once there was

a delay which denied the defendant his right to a speedy trial.

This is precisely the situation in the present case. The defendant here has been made, unnecessarily, unreasonably, and through no fault of his own, to suffer anxiety, concern and public scorn as well as the impairment of his ability to defend himself because of a delay in prosecution. The court cannot restore this time to the defendant nor can it cure the imposition resulting from the delay. Therefore, the court must employ the only remedy possible, dismissal of the charges against the defendant, thus barring further proseuction on the charges.

E. *Under F.R.Cr.P. Rule 48(b) The Court Must Dismiss the Charges Against the Defendant for Unnecessary Delay In Bringing An Indictment.*

The Court has the power, under Federal Rules of Criminal Procedure Rule 48 (b) to dismiss the indictment for unnecessary delay in presenting the case to the Grand Jury. Rule 48(b) is a non-constitutional speedy trial remedy, the exercise of which is placed within the discretion of the Court. The Rule is meant to cover those cases where the defendant's Sixth Amendment rights have been violated and those cases which the Court feels warrant dismissal even though no constitutional rights have been denied. Various courts have explained the purpose of the Rule:

> "Rule 48(b) obviously does not grant the Appellant less rights than the Sixth Amendment. Indeed, it places a stricter requirement of speed on the prosecution, and permits dismissal of an indictment even though there has been no constitutional violation." *Mathies* v. *U.S.*, (C.A.D.C. 1967), 374 F. 2d 312, 314-315.
>
> "Concerning appellant's argument that there was 'unnecessary delay in bringing defendant to trial' within the meaning of Rule 48(b), F.R.Crim.P., we agree that the rule imposes a more stringent standard that the Sixth Amendment as the Committee Note to Rule 48(b) states, part (b) 'is a restatement of the inherent power of the court to dismiss a case for want of prosecution.'" *U.S.* v. *Deleo*, (1st Cir. 1970), 422 F. 2d 487, 495.

The standards used for determining whether a Rule 48 (b) dismissal is warranted in a particular case, therefore, would not be as strict as those imposed for Sixth Amendment violations. One court has held that the purposefulness of a delay need not be shown. The defendant may prevail under Rule 48 (b) on a showing that a lengthy, unexplained delay did occur. The court said:

> "The Government argues that the defendants have the burden of showing that any delay in prosecution was 'among other things purposeful.' citing *Reece* v. *United States*, 5 Cir., 1964, 337 F. 2d 852: *Pollard* v. *United States*, 1957, 352 U.S. 354, 77 S.Ct. 481, 1 L. Ed. 2d 393; *United States* v. *Miller and Dubas*, E.D.Pa., 1966, 259 F.Supp. 294; *Davidson* v. *United States*, 8 Cir., 1963, 312 F. 2d 163. However, these cases deal with the Sixth Amendment, not with dismissal on non-constitutional grounds under Rule 48 (b). It is true that courts on occasion have referred to a lack of purposeful delay—along with other matters—in refusing to exercise their discretion to dismiss under Rule 48 (b). However, the cases do not suggest that it would be an abuse of discretion for a court to dismiss under Rule 48 (b) on non-constitutional grounds when lengthy delay, not necessarily purposeful, has been shown . . . . No effort was made by the United States Attorney to prosecute these cases prior to the conference called by the Court thirty-four months after the indictments were returned, and the United States Attorney offered no evidence to explain the failure to do so. The evidence is clear, then, that there has been 'unnecessary delay.' The Government's contention it must be presumed to have acted reasonably must fall before this evidence." *U.S.* v. *Mark II Electronics of Louisiana, Inc.* (D.C.La. 1968), 283 F. Supp. 280, 284-85.

The facts in the present case show that the defendant has been denied his right to a speedy trial. The overwhelming weight of the evidence shows that the government was indifferent to and negligent in bringing the case to trial. There is no valid reason for the delay in this case, thus bringing it within the "unnecessary delay" standard of Rule 48 (b). The Court has the inherent power to dismiss the charge for failure to prosecute.

The District Court in *U.S.* v. *McKee* (D.C.Wyo. 1971), 332 F.Supp. 823, exercised its discretion in dismissing a murder charge against the defendant where an indictment was delayed for five years and the defendant was at all times available to the Government because he was in custody. The Court found that:

> "At all times since October 3, 1965, defendant has been in custody either of the United States authorities or the penal authorities of the State of Oklahoma and, during all of said period, was readily available for trial upon the charges as set forth in both indictments. Delay in prosecution of the charge of murder was in no way induced by acts of the defendant or his legal counsel and defendant actually attempted to resist such delay by refusing to waive extradition to the State of Oklahoma. . . . Defendant was neither responsible for the dismissal of the first indictment nor for the failure thereafter, for a period of five years, to proceed further with respect to the charge therein contained. Defendant has been denied a speedy trial in violation of Rule 48 (b) of the Federal Rules of Criminal Procedure. *Id.* 332 F.Supp. at pp. 825-826, 827.

The facts in the present case are similar. The defendant was at all times available to the Government and attempted to resist and delay in prosecution. No delay or portion of it can be charged to Dr. MacDonald or his counsel. The sole burden for the delay rests with the Government.

II *Conclusion*

The inescapable conclusion from the Government's actions, or rather inaction, in this case is that the defendant's constitutional right to a speedy trial has been violated and that this is a case warranting Court action for "unnecessary delay" in bringing prosecution under Rule 48(b). Under such circumstances the Court must dismiss the indictment against the defendant.

Respectfully submitted,

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UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA FAYETTEVILLE DIVISION

UNITED STATES OF AMERICA

v.

JEFFREY R. MACDONALD

Criminal No. 75-26-CR-3

GOVERNMENT'S ANSWER TO DEFENDANT'S MOTION TO DISMISS INDICTMENT FOR DENIAL OF RIGHT TO SPEEDY PROSECUTION AND TRIAL

The United States of America, through the United States Attorney for the Eastern District of North Carolina, responds to defendant's Motion to Dismiss the Indictment for Denial of Right to Speedy Prosecution and Trial, filed herein on April 8, 1975, as follows:

The response made by the United States to defendant's Motion to Dismiss Indictment for Double Jeopardy and Collateral Estoppel answers in the counterstatement of facts the allegations here set forth in paragraphs "1" through "15" of defendant's Motion.

The unsupported conclusion that the defendant's rights have been violated, is rejected. The Indictment against Jeffrey MacDonald for the murder of his family on February 17, 1970, is not the result of someone "finding" this case in a file cabinet after five years and re-activating it for presentation to a Grand Jury. Rather, it is the culmination of years of investigative activity, much of it prompted by "red herrings" and diversionary leads furnished by defendant Jeffrey R. MacDonald himself, and by those individuals purporting to speak for him and on his behalf. It is also the result of a continuous study and analysis of physical evidence and weighing its import in assessing criminal liability.

If the Court will permit a few observations, of which, it is respectfully submitted, the Court should take judicial notice, the factual account that follows will be placed in the proper frame of reference.

(a) The population of a large military base, such as Fort Bragg, is in a constant state of fluctuation for the reasons that military personnel and their dependents are constantly being reassigned within the service, and personnel are continually entering the military service from and returning to civilian life.

(b) In an investigation involving a medical doctor the number of potential investigative leads stemming from personal association tends to be considerable. This is particularly true in the case of a young doctor as socially gregarious as Jeffrey R. MacDonald and one who had changed his residence as frequently in the recent past as has MacDonald. (Patchoge, L.I., N.Y., Princeton, N.J., Chicago, Ill., Bergenfield, N.J., Fort Bragg, N.C.)

(c) When a bizzare crime receives extensive media coverage, the incidence of false leads provided by those who are sincere and well meaning as well as by the cranks, the publicity seekers, the reward seekers, and those who may be paranoid and compulsive, and obsessed with a sense of guilt, multiplies geometrically. Much investigative effort is required to sift out relevant facts from those which are irrelevant, although often the result may not justify the effort expended.

(d) Normal turnover and reassignment of personnel in law enforcement agencies can extend the time required to complete an investigation. Such necessary and inevitable changes in personnel, with resulting slippage of time and continuity, are unavoidable in any Governmental or bureaucratic type organization.

I. *Counter Statement of Facts*

The investigation of the murders involved in this case must be divided into phases for the purpose of this response. We respectfully urge the Court to keep in mind that Jeffrey MacDonald, from the time of the murders was *not* the only subject of this investigation. However,

to the extent that special agents wasted their valuable time pursuing false leads to their logical conclusion, the wastage may be attributed directly to false information supplied by MacDonald as the only surviving eyewitness to the murders laid in the Indictment.

1. Phase one of the investigation extended from February 17, 1970, to October 23, 1970. It involved the Fort Bragg CID, the FBI, the Cumberland County Sheriff's Office, other co-operating local police agencies, and Colonel Rock's Article 32 proceedings. It culminated with Colonel Rock's Investigating Officer's report.

2. Phase two might best be called the Investigations of the Investigation. It covered the period from December 1970 through January 21, 1971. During this interlude, members of the Congress of the United States, the Secretary of the Army, the Inspector General of the Army, the Judge Advocate General of the Army, and the Commander of the United States Army Criminal Investigation Agency (USACIDA), were all involved in intensive investigations predicated upon allegations leveled by Jeffrey MacDonald and his counsel against many of those responsible for the first phase of the murder investigation. These allegations charged the commission of various acts of misfeasance, malfeasance and criminal negligence, including willful and negligent destruction of evidence, suppression of evidence, and perjury.

3. Phase three commenced when the Department of Justice, to whom the case had been referred, requested the Army to continue its investigative effort. Using the Fayetteville office of the United States Attorney as a base, a team of ten CID investigators and administrative personnel expended a total of twenty thousand man-hours during the eleven month period from January 21 to December 6, 1971. During this interval six hundred and ninety-nine interviews were conducted over a geographic area which included thirty of the continental United States, as well as Hawaii, Vietnam, Okinawa, Germany, The Panama Canal Zone, and Puerto Rico. An estimated four hundred intergovernmental contacts were made with various local law enforcement authorities which resulted

in one hundred and fifty-nine instances when some assistance was rendered to the investigators. The investigation proliferated into a number of mini-investigations, inquiring into the whereabouts and the alibis of numerous "hippies" and "drug culture types" in an attempt to identify those individuals who might fit the descriptions furnished by Jeffrey R. MacDonald, at the instigation of his attorneys, to a police artist in Philadelphia.

The Helena Stoeckley lead, furnished by Jeffrey R. MacDonald, may be cited as a prime example of obfuscation of the CID's investigation. William Posey, produced as a "mystery witness" at the Article 32 investigation, and who was furnished "escape" money by Jeffrey R. MacDonald's counsel, became non-available when the CID sought further information from him. Nevertheless the Posey lead was run out to its logical conclusion.

CID agents obtained fingerprints, hair samples, and photographs of each possible suspect contacted. The fingerprints and hair, which in every instance were supplied voluntarily by the possible suspect, were in each case sent to the crime laboratory for comparison and possible elimination. Photographs of each and every possible suspect were shown to Jeffrey R. MacDonald, who furnished no positive identification of any particular individual. In five instances polygraph tests were administered to possible suspects, all with negative results. Contrary to the defendant's allegation, the Government was not, as of 1970, in possession of all of the physical evidence which was evaluated in conjunction with the Grand Jury's investigation. It should also be noted that in the interval between the Article 32 and Grand Jury investigations, some crucial witnesses did not cooperate with Government agents and representatives out of fear for their personal safety.

Phase three continued through the spring of 1972. While it was in progress, the vast amount of raw investigative material collected was reduced to a multi-volume report of investigation. Likewise, on various occasions, there were conferences and exchanges of views between personnel of the United States Attorney's Office, the De-

partment of Justice, and the Army's CID, for the purpose of analyzing the facts and focusing on possible areas for further investigation.

4. Phase four commenced in June 1972 when the Army CID forwarded its report of investigation, including possible leads subject to further development, to the Department of Justice. During the summer of 1972 several conferences were held which included representatives of the Department of Justice, the United States Attorney for the Eastern District of North Carolina, members of his staff, and members of the Army CID's investigative team. Besides analyzing the facts set forth in the investigative reports, Government attorneys engaged in considerable legal research related to the peculiar facts and problems of this case.

In September, 1972, as the Court well knows, the incumbent United States Attorney for the Eastern District of North Carolina and his assistant most familiar with the case, left Government service. Thereafter, the General Crimes Section of the Criminal Division, Department of Justice continued to work upon the case, requesting that the Army conduct further investigation. The Army complied. In the spring of 1973, the present incumbent United Sttaes Attorney, having had an opportunity to review the voluminous report and visit the crime scene, also requested further investigative effort. The Army again complied. Thereafter, lawyers, both in the Department of Justice and the United States Attorneys office engaged in extensive review, analysis, and research, attempting to resolve the problems inherent in the case.

Finally it became apparent that these inherent problems could only be resolved by a thorough Grand Jury investigation, calling as witnesses before the Grand Jury all persons who might have knowledge of pertinent facts.

5. Phase five is the Grand Jury investigation of the whole matter. Jeffrey R. MacDonald was subpoenaed as a witness. With the benefit of advice from his attorneys he agreed to testify. He was advised of his Constitutional rights, advised that he was a suspect, afforded the opportunity to confer with his counsel, who was in attendance

to advise him in connection with his Grand Jury appearance, and ultimately testified in substance as he had in 1970. The Grand Jury's investigation, being exhaustive, was time consuming, but it was in no way needlessly delayed. Contrary to the assertion of his counsel, Jeffrey R. MacDonald was not indicted to satisfy any "outside pressure." Rather he was indicted because the Grand Jurors did not credit his testimony as thc only surviving eyewitness. Their disbelief was not the result of any pressure by the Government attorneys, but was based upon the fact that his story lacked credibility, when viewed in the light of all the circumstances in the case, considered in their entirety. Any delay involved in the investigation of this case or its presentation to a Grand Jury has been neither purposeful nor oppressive. Rather it has been the result of a conscientious effort to ascertain the true facts concerning an obscure incident, having only one surviving witness, who is in fact criminally culpable. Further, it involves a situation where the defendant presented many false leads to the investigators, diverting them into numerous blind alleys and causing them to concentrate their efforts on any vulnerable person whose appearance and style of dress might fit vague descriptions supplied by the defendant herein.

Defendant, in his Motion, implies that the Government, by some devious means, has kept the military charges alive and pending against him and that as the result of "outside pressures" the Grand Jury was coerced into returning a true bill based on these military charges. This simply is not true. The Grand Jury, acting quite independently as an inquisitorial body, indicted MacDonald because it was satisfied on all the evidence, including evidence provided by MacDonald himself and by witnesses called before the Grand Jury at his suggestion, that he had committed the offenses with which he is charged.

II.

The defendant's Motion to Dismiss, while making reference to alleged violations of his Constitutionally protected rights to due process under the Fifth Amendment, speedy

trial under the Sixth Amendment and speedy prosecution under Rule 48, Federal Rules of Criminal Procedure, provides no factual allegation of prejudice other than mere passage of time. He merely asserts that the Government was negligent and indifferent to his rights, but he fails to demonstrate how he has been prejudiced and how that prejudice will prevent him at this time from getting a fair trial. Consequently, the defense claim of a violation of due process has not been substantiated.[1] This is not a case where a man has been imprisoned for one crime, and doesn't learn of a detainer filed against him for another crime, until he has served seven years of his sentence and then emerges from prison sixteen years after the alleged crime to stand trial.[2] Nor is this case in any way analogous to the abuses condemned in *Petition of Provoo*,[3] in which the defendant was on trial for treason committed between 1942 and 1945, while a prisoner of war, and had been held without charge by the Army for the Justice Department, and was currently being re-tried in 1954. This case is clearly distinguishable from *Klopfer* v. *North Carolina*[4] which condemned post accusation delay occasioned by the filing of a nolle prosequi with leave by the Government. Jeffrey MacDonald has not been in jail prior to indictment, he has been continually represented by the same counsel, his defense is predicated on his account of the intruders' attack which has remained basically the same account since 1970, he is the only defense eyewitness, he has not been subject to public scorn and obloquy, he has not alleged the death or disappearance of any witness material to his defense; in short he merely claims denial of due process, he doesn't substantiate it.

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[1] In *Napue* v. *Illinois*, 360 U.S. 264 (1959), the State executed one of the eyewitnesses to a murder, and then tried Napue. The case also involves the Government's knowing use of false testimony. See also *Brady* v. *Maryland*, 373 U.S. 83 (1963) involving the suppression by the Government of an accomplice's confession in a separate trial.

[2] *Pitts* v. *State of North Carolina*, 395 F.2d 182 (C.A. 4).

[3] 17 F.R.D. 183.

[4] 386 U.S. 213 (1967).

The United States Supreme Court in reviewing the speedy trial question in *Barker* v. *Wingo*, 407 U.S. 514, (1972), rejected the inflexible time standard, which defendant now urges the Court to apply, in favor of a balancing test to be applied by Courts on an *ad hoc* basis. Although, *Barker* v. *Wingo* involved the issue of five years post arrest delay in bringing the defendant to trial, the opinion by Mr. Justice Powell is still pertinent to this case. Mr. Justice Powell wrote:

> "Thus unlike the right to counsel or the right to be free from compelled self-incrimination, deprivation of the right to speedy trial does not per se prejudice the accused's ability to defend himself. 407 U.S. at 521."

Mindful of the societal consequences inherent in the application of a per se rule, the Court referred to its earlier opinion in *Beavers* v. *Haubert*:

> 'The right of speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice. 198 U.S., at 87.'
>
> "The amorphous quality of the right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. This is indeed a serious consequences because it means that a defendant who may be guilty of a serious crime will go free, without having been tried."

III.

The defense alleges that the time which elapsed between the commission of the murders and MacDonald's Indictment and arrest on January 24, 1975, has caused his Sixth Amendment right to a speedy trial to be violated, therefore he moves under Federal Rule of Criminal Procedure 48[5] for a dismissal of the Indictment. Presumably,

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[5] "Rule 48. Dismissal—(a) By Attorney for Government. The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint

the defense intends the Court to dismiss the Indictment pursuant to Federal Rules of Criminal Procedure Rule 48(b), 18 U.S.C.A. Clearly, that rule can have no application to this case, because until he was indicted on the 24th of January, 1975, he had never been held to answer to any district court. As Mr. Justice White said in *United States* v. *Marion*:[6]

> ". . . In any event, it is doubtful that Rule 48(b) applies in the circumstances of this case [38 month pre-indictment delay], where the indictment was the first formal act in the criminal prosecution of these appellees." See *Nickens* v. *United States*, 323 F.2d 808, 809 (CADC 1963), *cert. denied*, 379 U.S. 905 (1964); *Harlow* v. *United States*, 301 F.2d 261, 266 (C.A. 5), *cert. denied*, 371 U.S. 814 (1962); *Hoopengarner* v. *United States*, 270 F.2d 465, 469 (C.A. 6, 1959); *United States* v. *Hoffa*, 205 F.Supp. 710, 720-721 (S.D. Fla., 1962)

Justice White goes on to state that Rule 48(b) is clearly limited to post-arrest situations. Jeffrey MacDonald cannot claim that he was held to answer to the District Court before January 24, 1975. Further, there is ample authority for the requirement of a showing of prejudice in order to prevail under Rule 48(b).[7] Consequently, the defense's

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and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant. (b) By Court. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

[6] 92 S.Ct. 455, 404 U.S. 307, 30 L.Ed.2d 468, note 4 (1971).

[7] *U.S.* v. *Lewis*, C.A. 7, 1969, 406 F.2d 486, *cert. denied* 89 S.Ct. 1630, 394 U.S. 1013, 23 L.Ed. 239; *U.S.* v. *McCarthy*, C.A. 2d 1970, 422 F.2d 160, dismissed 90 S.Ct. 1864, 398 U.S. 946, 25 L.Ed. 286; *U.S.* v. *Johnson*, D.C. Ill. 1969, 298 F.Supp. 58; *U.S.* v. *Lee*, C.A. 7th 1969, 413 F.2d 910, *cert. denied* 90 S.Ct. 595, 396 U.S. 1022, 24 L.Ed.2d 515, *U.S.* v. *Morris*, D.C. Pa. 1970, 308 F.Supp. 1348; *U.S.* v. *DeTienne*, C.A. 7th 1972, 468 F.2d 151, *cert. denied* 93 S.Ct. 974, 410 U.S. 911, 35 L.Ed.2d 274; *U.S.* v. *Bray*, C.A. 9th 1971, 442 F.2d 1064; *U.S.* v. *Ybarra*, C.A. 9th 1970, 430 F.2d 1230, *cert.*

argument falls because, absent formal restraints imposed on a putative defendant, the statute of limitations provides protection against possible prejudice. The Sixth Amendment speedy trial clause does not become applicable until the formal initiation of criminal proceedings whether by indictment, information or arrest and subsequent restraints on his liberty.

In *United States* v. *Marion*, there was a thirty-eight month delay between the last act in an alleged fraudulent scheme which covered a two year period and the return of the indictment. The Court, in rejecting the claim of prejudice stated unequivocally that the Sixth Amendment speedy trial provision has no application until the putative defendant becomes an "accused" by indictment.

The *Marion* case is so apropos to the circumstances of the case now before the Court, and the opinion itself is such an excellent exposition of the applicable law, that we are attaching a copy of it in its entirety as an appendix to this brief.

IV.

Congress in enacting 18 U.S.C.A. Sec. 1111 expressly provided that:

> ". . . Whoever is guilty of murder in the first degree, shall suffer death unless the jury qualifies its verdict by adding thereto 'without capital punishment,' in which event he shall be sentenced to imprisonment for life. . . ."

By extending the penalty provided in Section 1111 to the killing of officers and employees of the United States, Congress expressed its continuing intent to make murder in the first degree a capital offense.[8] Since murder under this statute can be a capital offense then there is no limita-

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denied 91 S.Ct. 589, 400 U.S. 1023, 27 L.Ed.2d 636; *U.S.* v. *Gross*, C.A. 8, 1969, 416 F.2d 1205, *cert. denied* 90 S.Ct. 1245, 397 U.S. 1013, 25 L.Ed.2d 427.

[8] 18 U.S.C.A. Sec. 1114, as amended Oct. 26, 1974, Public L. 93-481, § 5, 88 Stat. 1456.

tion on the time for returning an indictment.[9] The Indictment having been returned before the fifth anniversary of the crime, February 17, 1970, the Indictment is still within the statute of limitations [10] even if the death penalty is not at issue.

While the Speedy Trial Act of 1974 [11] does not become effective until July 1, 1975, it is relevant to the rebuttal of defendant's assertions, that Congress in reviewing the whole issue of speedy trial, did not provide relief for one who has not been held to answer either by indictment, information, complaint, or arrest. Congress obviously did not intend to change the time limits within which an indictment may be returned; if that had been their intention, the statute of limitations would have been amended.

For the reasons set forth above, and in view of the gravity of these crimes, defendant's Motion should be denied.

Respectfully submitted this 25th day of April, 1975.

THOMAS P. MCNAMARA
United States Attorney

BY: /s/ Victor C. Woerheide
VICTOR C. WOERHEIDE
Attorney, Department of Justice

/s/ James T. Stroud, Jr.
JAMES T. STROUD, JR.
Assistant United States Attorney

/s/ Brian M. Murtagh
BRIAN M. MURTAGH
Attorney, Department of Justice

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[9] 18 U.S.C.A. Sec. 3281 "An indictment for any offense punishable by death may be found at any time without limitation except for offenses barred by the provisions of law existing August 4, 1939.

[10] 18 U.S.C.A. Sec. 3282.

[11] 18 U.S.C.A. Sec. 3153-3156.

AFFIDAVIT

STATE OF NORTH CAROLINA)
) ss.
COUNTY OF WAKE)

BRIAN M. MURTAGH, ESQ., being duly sworn according to law, deposes and says that he is an attorney for the Government in this action and that the facts set forth in the within Response are true to the best of his knowledge, information and belief.

/s/ Brian M. Murtagh
BRIAN M. MURTAGH
Attorney, Department of Justice

[SEAL]

Sworn to and subscribed before me this 25th of April, 1975.

/s/ Joyce W. Todd
Deputy Clerk, United States District Court
Eastern District of North Carolina

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing Response to Motion to Dismiss Indictment for Denial of Right to Speedy Prosecution and Trial upon the defendant by depositing a copy of the same in the United States mail addressed to defendant's attorneys as follows:

Mr. Bernard L. Segal
Associate Professor of Law
Golden Gate University
536 Mission Street, Suite 220
San Francisco, California 94105

Ms. Durant Williams Escott
Attorney at Law
412 Law Building
Charlotte, North Carolina 28202

This 25th day of April, 1975.

/s/ Brian M. Murtagh
BRIAN M. MURTAGH
Attorney,
Department of Justice

AFFIDAVIT

WASHINGTON)
) ss.
DISTRICT OF COLUMBIA)

I, Kevin T. Maroney, being duly sworn, depose and state as follows:

I am Deputy Assistant Attorney General of the Criminal Division, United States Department of Justice, a position I have occupied since about April 1973. In that capacity, I became and continue to be directly responsible for work being done in various Sections of the Criminal Division, including the General Crimes Section. I am familiar with the work that was done by personnel of the Criminal Division with respect to the MacDonald murder and assault case. This case involved the violent deaths of Colette, Kimberly and Kristen MacDonald, an alleged assault upon Jeffrey R. MacDonald, their husband and father, and allegations by MacDonald of criminal misconduct by Army personnel who investigated the case. Jeffrey R. MacDonald was a suspect in the murder investigation. To the best of my knowledge and belief the following is an account of the activities of the Department of Justice in the matter.

The case initially was referred to the Department of Justice by the United States Army Criminal Investigation Command in June of 1972. The reports of the Army CID, the investigative agency, were voluminous. They filled 2 ½ file cabinet drawers. The case was assigned and reassigned to various staff attorneys, of the General Crime Section, who repeatedly reviewed and rereviewed the matter. Numerous conferences were held with the personnel of the Army's Criminal Investigation Command and with the United States Attorneys in Raleigh, North Carolina and their assistants. Various requests for further investigation were made. The CID did perform additional investigation, as requested, to the extent it was possible to do so, and the results were reported back to the Department of Justice.

The matter remained under active consideration and review in the General Crimes Section of the Criminal Division until July of 1974 when a decision was made to initiate an investigative Grand Jury proceeding in order to resolve certain inherent problems which were peculiar to the case. The case then was assigned to Victor C. Woerheide, Staff Assistant to the Assistant Attorney General of the Criminal Division, and he was given special authorization to initiate a Grand Jury investigation. At no time while the matter was assigned to attorneys in the General Crimes Section was a decision made to close it out as a non-prosecutable case. It remained at all times an open and active case, under constant reconsideration and review as various investigative alternatives were explored, leads were run out by investigators, and fragments of information were volunteered by persons attempting to be helpful.

The Grand Jury began its investigation on August 12, 1974 and continued to call witnesses and hear evidence until January 24, 1975. At that time the Grand Jury returned the indictment now pending against Jeffrey R. MacDonald.

/s/ Kevin T. Maroney
KEVIN T. MARONEY

[SEAL]

Subscribed and Sworn to before me this 22nd day of April, 1975

/s/ Sharon Schult
Notary Public

My commission expires: May 31, 1977

March 27, 1973

Address replies to:

Suite 220
536 Mission Street
San Francisco, California 94105
a/c 415 391-7800, ext. 372

Gary Kleinschmidt, Esq.
General Crimes Division
Criminal Division
Department of Justice
Washington, D.C.

Re: Dr. Jeffrey MacDonald

Dear Mr. Kleinschmidt:

I am writing to advise you that I am Chief Counsel for Dr. Jeffrey MacDonald. I am aware that you have been in contact recently with Michael Malley Esq., of Washington, D.C., who is also acting, together with me, as counsel for Dr. MacDonald.

I am taking the liberty to again urge upon you and the Justice Department to accept our offer to submit Dr. MacDonald to an in depth on-the-record interview by your offiece.

It seems to me that there are mutual advantages to our suggestion. From the standpoint of your office it would present the opportunity to perhaps obtain answers to some of the questions that may have arisen in your minds as a result of the study of the record and investigative reports in this case. From our standpoint we believe that an interview with Dr. MacDonald can only confirm the correctness of the finding of the Army's own initial hearing officer, Colonel Rock.

I understand that at least one consideration that weighs in your decision is your concern for possible publicity that might emanate from Dr. MacDonald or his counsel as a result of such an interview. Let me state what should be obvious; Dr. MacDonald cannot in any significant way gain from such publicity. The publicity in regard

to your current review of the case allegedly stemmed from the release of information of persons connected with the Justice Department. While I understand you made assurances to Mr. Malley that corrective steps have been taken in this regard, I do not think that this argues for now denying Dr. MacDonald the opportunity to tell his story to you. In order to totally obviate this issue I would be willing to enter into a written agreement with the Justice Department binding all parties to make no comment about such an interview.

I would appreciate your reply.

Sincerely,

/s/ Bernard L. Segal
BERNARD L. SEGAL

cc: Michael Malley, Esq.
BLS:bew

DEPARTMENT OF JUSTICE
Washington 20530

Mr. Robert D. Wallick
Steptoe & Johnson
Attorneys at Law
1250 Connecticut Avenue
Washington, D.C. 20036

April 9, 1973

Dear M. Wallick:

Your letter of March 30, 1973, to Deputy Attorney General Sneed, concerning Dr. Jeffrey MacDonald, has been referred to me for consideration and reply. You indicated Mr. Michael Malley for your firm wished to outline for us facts developed in the course of earlier Department of the Army proceedings with respect to Dr. MacDonald.

Mr. Malley made similar proffers by telephone to my deputies and was informed on April 4 that his presentation at this time would be premature. When the time is appropriate, we will contact Mr. Malley and afford him an opportunity to make his presentation.

We trust this letter will serve to confirm the telephone conversations with Mr. Malley and that you will convey to him our appreciation for his interest in the matter. Whatever our intended disposition may be, his view of the facts will be of interest to us.

Sincerely,

/s/ Henry E. Petersen
HENRY E. PETERSEN
Assistant Attorney General

STEPTOE & JOHNSON

ATTORNEYS AT LAW

1250 Connecticut Avenue
Washington, D.C. 20036
(202) 223-4800

Honorable Joseph T. Sneed
Deputy Attorney General
Department of Justice
Washington, D.C. 20530

Dear Mr. Sneed:

Bob Wallick of Steptoe & Johnson called you several days ago about arranging a meeting between me and representatives of the Justice Department regarding the current review of the murders of the family of Dr. Jeffrey R. MacDonald at Fort Bragg, N.C. on February 17, 1970. As you know, the Army pre-trial investigation under the provisions of Article 32 of the Uniform Code of Military Justice, which lasted throughout the summer and early fall of 1970, the charges were dismissed after the Investigating Officer in a lengthy report to the Convening Authority stated that he believed the charges to be "untrue." During that proceeding, I was one of Dr. MacDonald's military attorneys.

Apparently the Department is reviewing the case with a view toward possible submission of charges against Dr. MacDonald to a grand jury. You were kind enough to call Mr. Peterson's office on my behalf; I spoke with Mr. Burke, Mr. Peterson's deputy, and with Mr. Shapiro, who I was told would conduct the final Department review of the case. Mr. Shapiro informed me that it would be "premature" for him or other officials at Justice to meet with me or with Mr. Bernard L. Segal, Dr. MacDonald's chief counsel, at this time.

I am taking the liberty of enclosing a lengthy letter I have sent to Mr. Shapiro outlining my views of the case. As you will note, in addition to being Dr. MacDonald's lawyer, I am a close friend of his, and I do not

hesitate to say that my knowledge of the case, makes me absolutely convinced of his innocence.

I am asking that the Department, in its review, consider that, functionally, there was a full trial on the merits of this case at Fort Bragg, and that to put Dr. MacDonald through another such procedure without the most pressing necessity to do so, will be financially ruinous to him, personally humiliating, and, most important, a cruel and deep blow to his already shattered emotional well being. My letter to Mr. Shapiro points out several factual considerations which I hope will be evaluated; but I do not feel ashamed of also asking that the Department consider Dr. MacDonald's human suffering as part of its review of this matter.

The important thing legally to remember about this matter is, a complete hearing has already been held, with both sides represented by competent counsel, with an impartial fact-finder who had the services of a legal advisor, and with legal review of the outcome by the Staff Judge Advocate. A full submission of evidence by both sides insured that the Investigating Officer was in a position to evaluate the merits of the case, as well as the truthfulness of Dr. MacDonald, who testified and was cross-examined at length.

In view of these facts, I suggest that the Department's own review of the matter should be governed by the principles in *Ashe* v. *Swenson*, 397 U.S. 436 (1970), where the Court held that the doctrine of collateral estoppel was fully applicable to criminal proceedings under the Fifth Amendment. While I am not at this point arguing that *Ashe* squarely applies to a complete hearing under the provisions of Article 32 of the UCMJ, I am saying that the principles of *Ashe* certainly apply to Dr. MacDonald's case. First, there has been a complete hearing at which the government was fully represented and had the opportunity to fully litigate its case. See Mr. Justice Stewart's opinion for the Court, 397 U.S. at 443-447. The concurring opinion of Justice Brennan elaborates on the reason for not subjecting a man to prosecution for the same offense twice:

> [T]he State with all its resources and power [shall] not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity. 397 U.S. at 450 (quoting from *Green* v. *United States*, 355 U.S. 184 (1957).

Mr. Chief Justice Burger's dissent in *Ashe*, emphasized that the Chief Justice objected to the idea that different, but related crimes, were to be treated as the same transaction. But in this case, the crimes alleged are exactly the same, as is the sovereignty. So the Chief Justice's objection in *Ashe* is not present in this case.

Although I know that your position does not permit you the time to personally screen matters which are handled routinely at other levels of the Department, I am asking you, if at all possible, to take whatever steps you feel appropriate to insure that Dr. MacDonald's case is carefully evaluated. I am confident that a fair review of what has already been done at the Article 32 will support my own personal belief that Dr. MacDonald's innocence has been established, and that his legal ordeal should not be prolonged.

Sincerely,

Michael J. Malley

MJM/lag

Enclosure

April 9, 1973

Harold P. Shapiro, Esq.
Deputy Assistant Attorney General,
Criminal Division
Room 2113
Department of Justice
Washington, D.C. 20530

Dear Mr. Shapiro:

I appreciate your taking the time to talk to me on the phone April 4. Again, I would like to reiterate the offer both Mr. Bernard L. Segal, Dr. Jeffrey R. MacDonald's chief counsel, and I have made to you and other representatives of the Justice Department, to make ourselves and Dr. MacDonald available for complete, on-the-record interviews at your convenience. Although I realize you have indicated to me that such an interview is "premature" at this point, I would like to make sure that the Justice Department's review of the entire case receives the fullest benefit from our cooperation that is possible.

As you know, I was one of Jeff MacDonald's military defense counsel at the Article 32 investigation into charges he murdered his wife and two children at Fort Bragg, N.C. on February 17, 1970. In addition, I am a close personal friend of his. I'm well acquainted with the "case" and with Jeff's character, and I would like to point out several things which I hope you will consider as you conduct your review.

I will not at this point attempt to review item by item the evidence which was presented to the Article 32 investigation. What I think should be kept in mind, however, is that the mass of physical evidence which formed most of the government's case did *not* point at Dr. MacDonald. No other conclusion is possible based on the official Article 32 Investigating Officer's report. I think it should be remembered that the physical evidence introduced at the Article 32, viewed in the light most favorable to the prosecution, simply pointed up the fact that neither Jeff nor the government has any complete explanation for the

terrible events of the night. Certainly the Article 32 Investigating Officer, Col. Warren V. Rock, was aware of the continuing difficulty in offering a coherent explanation of the case (*e.g.*, some of the blood stains, etc.).

However, I think it is fair to say that Colonel Rock did not overlook these difficulties in recommending most strongly that there was no legal or factual basis for charging Jeff with these crimes. I think it is also fair to say that the government had more than ample oportunity to attempt to show how the physical evidence supported its case to an impartial factfinder. Another examination of the same physical evidence offers no assurance of producing anything more than was accomplished the first time. Even assuming that doubts arising from the (then) unevaluated physical evidence (*e.g.*, some fingerprints, some candle wax, etc.) have been resolved by further laboratory investigation, nevertheless, the physical evidence as a whole still goes nowhere. There can be no doubt that this was all taken into account by Colonel Rock when he himself evaluated the case and concluded no prosecution of Jeff was warranted.

The fact that the physical evidence is inconclusive makes it all the more important to consider other elements of the case in determining at this juncture whether or not the government received at the Article 32 an adequate evaluation of its case against Jeff by the Army's own Investigating Officer. The other elements of the case are, of course, not quite as tangible as physical evidence. But they are as important, if not more so. For they involve the character of the crime, and the character of Jeff himself.

First it should be remembered that the crime is most bizarre. This obvious fact should raise two reasonable, but conflicting, inferences about the perpetrators: (1) the crime was committed by incredibly calculating and cold-blooded persons; (2) it was committed by a person or persons who were berserk in some sense. But neither of these descriptions fits Jeff, and this was fully explored at the Article 32.

The record is replete with testimony about Jeff's character and mentality. Highly qualified psychiatric testimony from both the Army and the defense characterized Jeff as "normal" in every way, and as someone who showed no tendencies toward the kind of complete loss of self control which could lead to the slaughter of Colette and their two children. The psychiatrist called by the defense stated that in his professional opinion, it is most unlikely that Jeff could have committed the crime. The Army's psychiatric panel from Walter Reed Hospital, through its spokesman, stated they believed Jeff was telling the truth to the panel when discussing the circumstances of the crime. They concluded that Jeff was not the kind of person who would lose total control of himself and that he has absolutely no history or other indication of psychiatric disorder. In short, there was no psychiatric reason to disbelieve Jeff, or suspect that Jeff's character pointed toward any kind of abnormal behavior that almost seems a prerequisite to the commission of such a hideous crime against his wife and two children. The question of drug abuse by Jeff or Colette was not even an issue, since there was not the slightest indication that either of them used or abused drugs.

Other witnesses who had known Jeff and Colette at various stages of their lives testified as to Jeff's stability, his complete normal and positive attitude toward his life, his family, and his profession. No one indicated that there was any reason to believe Jeff was or is the kind of person who would lose control of himself to such an extent that his entire personal life, the family he loved deeply, would be slaughtered by his own hands.

Moreover, there is absolutely no indication that there were other stresses in Jeff's life which might have "triggered" an unexpected but non-recurring psychotic episode of such tragic proportions. The record contains the testimony of the woman who rode home from the Fort Bragg extension of the University of North Carolina with Colette the last night of her life. By this woman's account, Colette was happy and content with her life as of about 10:30 p.m. It is difficult to imagine that within four hours there erupted, unexplainedly, such a gross provocation

by Colette or Jeff, or Jeff of Colette, as to lead to the complete and spontaneous abandonment of Jeff's entire life. There is simply no reason to suppose that Jeff lost control of himself that night and destroyed his family.

Likewise, there is no reason to suspect that Jeff is a cold-blooded and calculating killer, who, for some unnamed motive, planned his family's death. Even hypothesizing that there were marital difficulties or other personal problems between Jeff and Colette (which was absolutely not the case), all testimony about Jeff was that he is a very bright, rational, decent human being quite capable of dealing with his problems in a rational manner. The same was true of Colette. Certainly, the cold-blooded slaughter of his family was not a rational or even thinkable alternative to divorce, if there were marital difficulties which were plauging the MacDonalds. But in fact, there were no such marital difficulties. Although Jeff himself admitted to the CID in an interview on April 6, 1970, and to Colonel Rock that he had on several occasions had extramarital sexual relationships, there simply is no evidence that (a) these amounted to more than brief physical liaisons which never underminded Jeff's emotional commitments to Colette and his family; or (b) that Colette ever knew of them, thus providing her with an occasion to raise the issue of Jeff's fidelity. The proof of this latter point is Colette's contented attitude toward her life the last night she lived, and her repeated statements of her pride in Jeff. The proof of the former point lies in all the testimony about Jeff's devotion to his family, and, most importantly, in Jeff's own believability (as found by Colonel Rock) when Jeff said he loved Colette and his children more than anything else in the world.

As I said before, had there been serious marital difficulty, Jeff and Colette were smart enough and well adjusted enough to have sought relief in the more prosaic method of divorce. Murder simply is not a believable alternative in such a situation. Of course, the prosecutors at the Article 32 investigation certainly did not even attempt to suggest that these casual liaisons were a "motive," though they and Colonel Rock were fully aware of them.

What I have said about the crime and about Jeff's character should be considered in the further light that Jeff himself testified fully at the Article 32, and was subjected to the fullest cross-examination on his testimony. Certainly this is of extraordinary significance, because, without witnesses to the crime, and with physical evidence which goes nowhere and everywhere, it becomes very important to get a good "feel," not just for what the only witness available, Jeff, saw, but also to get a good feel for him as a man. And, it should be kept in mind that the observer of Jeff's testimony was an unemotional, experienced, and impartial observer, a career Infantry Colonel.

Of course, the detailed findings of Colonel Rock include a *specific* finding that Colonel Rock *does* believe Jeff. This should not be dismissed lightly. It must be remembered (I as an eyewitness and participant can assure you) that great demands were placed on both prosecutors and defense counsel by Colonel Rock and by each other to produce vast amounts of evidence. So Colonel Rock had as background from which to evaluate Jeff an unusual amount of information. He also had the opportunity to see Jeff and hear him tell his story in detail, evaluate whether Jeff's tears—the record does not reflect the fact that Jeff testified much of the time while he was sobbing—were real or feigned. The Investigating Officer had an opportunity to evaluate whether Jeff was sincere when he professed his love for his family, when he described his own confusion and inability to help them, and when he described his loneliness and loss. And, of course, Colonel Rock believed Jeff. That is of some importance in trying to decide whether Jeff is a cold-blooded killer who planned to rid his life of an unwanted family and contrive a story to explain the murders. It is also of some importance in trying to decide whether Jeff's affection for his family and his family's affection for him was so shallow as to be shattered by a supposed family quarrel or other spontaneous provocation which would lead to slaughter.

What I am saying, in short, is, Jeff really is an important—the *most* important—part of this case, and the government did receive a fair and thorough opportunity

to have Jeff himself evaluated. Psychiatric testimony, people long acquainted with Jeff, and Jeff himself, provided a good chance for the government's impartial factfinder, Colonel Rock, to weigh whether it was even thinkable that Jeff could have been capable of the crimes he was charged with. I think that a review of a cold record at this point without taking this into account, does a disservice to the government's own Article 32 investigation, and to Jeff. In this case, simply reading papers is not really an adequate substitute for the in-person evaluation Colonel Rock was able to provide.

I realize that, from the Department of Justice's point of view, perhaps the case was 'overtried" at the Article 32 stage. If this had been a routine grand jury proceeding, with the government presenting only its side of the case, perhaps an indictment could have been obtained. But you should remember that under military law, the Article 32 proceeding has long been held by the Court of Military Appeals to be a "dress rehearsal" for a full and complete trial. Certainly the prosecution was well aware of this fact. So it is not strictly correct to conclude that it was "premature" for the Army to bring the Article 32; nor can it be said that the defense "surprised" the government by its vigorous presentation of the Investigating Officer. The Army was well aware that, when it appointed an Article 32 officer who specifically requested the assistance of a qualified legal officer and former military judge as his legal advisor, a rather complete case was expected by all parties at the Article 32 level. Given the fact it was the United States which chose the time of the Article 32 investigation, and resisted the defense efforts for a continuance for the purpose of preparation, it is not fair to call the whole proceeding "premature" and simply dismiss it at that.

From the defense's viewpoint, it was and is our position that we had nothing to lose and everything to gain by full cooperation with any impartial factfinding process. From Jeff's point of view, we believe this should be done at the earliest possible opportunity, so as to minimize the time Jeff's life was disrupted beyond what had already happened to him. That is why we insisted on exercising

our right to present a "defense" at the Article 32. I do not think it would be fair now to use that against Jeff, by arguing that the government didn't get a chance to make a one-sided presentation to a *pro forma* investigating official.

Instead, what the government got at the Article 32 was a chance to evaluate its own case in the perspective of having complete access to the accused man himself—something that the government ordinarily does not get. Functionally, a full-blown trial was held. I suggest to you that, rather than distorting the pre-trial factfinding process, this enhances it for the government, and should be a major factor you now consider when you reevaluate this case. You should remember that not only was the government represented in the Article 32 by two prosecutors and by Colonel Rock, but the government received further protection by the fact that the military Convening Authority who appointed the Article 32 Officer had complete freedom under the Uniform Code of Military Justice to reevaluate the Article 32 record himself after receiving the opinion of his legal advisor, the Staff Judge Advocate. There was no legal obligation on the part of the Convening Authority to accept Colonel Rock's report if there was any doubt in anyone's mind that Colonel Rock had dealt fairly with any legitimate governmental interest. I hope you will remember that the Army legal system, which I served with some pride, like the Department of Justice, has as its primary responsibility the protection of the United States' best interests. Accordingly, I hope you will not discount the Article 32 process as simply a military matter which should not concern you.

Finally, I would like to say something about a human judgment which you must make in any decision to reevaluate this case. Jeff has spent a long time—three years—trying to get the tag ends of his life together again. Although he has partially succeeded, as his friend I know that there is still a great deal of loneliness and hurt that he lives with every day. Some of the things you must consider is, any sort of formal attempt to accuse him again will result in devastating publicity, enor-

mous financial loss, and personal humiliation to him. More importantly, the terrible strain that surrounded the Article 32 investigation—please keep in mind that the Article 32 was as exhausting and emotionally debilitating as any lengthy major criminal proceeding could be—would have to be relived, as would all the memories of the murders. I know as a friend of Jeff's that he lives with these memories every day. But now he is not compelled to spend every waking minutes with them; he is not compelled to go over and over in his own mind the details, the images of his family, dead, that are as vivid to him as the color photographs which form part of the record of the case, and which are so vivid to me.

During the Article 32, Jeff was compelled to lead such an existence, so that the government could assure itself that its laws were respected. But to make Jeff go through it again, without the most compelling necessity, simply is not called for. I am asking you to consider, in making your evaluation of this case, that the United States has already received a full hearing of the whole story of Jeff MacDonald's part in his family's death. That hearing permanently cut a part of Jeff's life out—I am sure you can understand that his reputation and his own emotional well-being have been permanently damaged by the necessity of undergoing the ordeal of a months-long hearing into allegations that he murdered the people he loved most in the world. Now that you are being asked to do this again, I hope you will consider that the interests of justice should require at least as much respect for the plight of a man whose life has already been tragically scarred by fate and the dictates of the law, as for the government which has already had the benefit of an exhausting and exhaustive evaluation of the case.

As I stated at the outset, I would like to have whatever opportunity I could to discuss the case with Mr. Segal. I am sure you appreciate my concern as Jeff's lawyer and his friend. I am sure you will understand that the matters which I have discussed in this letter are directed to you as the Justice Department's repre-

sentative who currently has authority to act in this case. I hope that if there are other officials to whose attention I should bring these comments, you will let me know.

Sincerely,

/s/ Michael J. Malley
MICHAEL J. MALLEY

MJM/lag

cc: Bernard L. Segal, Esq.
Hon. Joseph T. Sneed, Esq.

UNITED STATES DEPARTMENT OF JUSTICE
Washington, D.C. 20530

May 3, 1973

Mr. Michael J. Malley
Steptoe & Johnson
Attorneys at Law
1250 Connecticut Avenue
Washington, D.C. 20036

Re: *Dr. Jeffrey MacDonald*

Dear Mr. Malley:

This is in response to your recent letter to Mr. Shapiro concerning Dr. Jeffrey MacDonald, reiterating your offer to make Dr. MacDonald available for on-the-record interviews.

As indicated in our letter of April 7, 1973, to Mr. Wallick, we will contact you, and afford you an opportunity to make your presentation, at the appropriate time.

Sincerely,

HENRY E. PETERSEN
Assistant Attorney General
Criminal Division

By: /s/ Carl W. Belcher—A.L.H.
CARL W. BELCHER
Chief, General Crimes Section

UNITED STATES DEPARTMENT OF JUSTICE
Washington, D.C. 20530

May 3, 1973

HEP:CWB:GK:mdz
90-1-7-54
AIR MAIL
Mr. Bernard L. Segal
Suite 220
536 Mission Street
San Francisco, California 94105

Re: *Dr. Jeffrey MacDonald*

Dear Mr. Segal:

This is in response to your recent letter to Mr. Kleinschmidt concerning Dr. Jeffrey MacDonald, in which you joined Mr. Malley in urging the Department of Justice to accept your offer to submit Dr. MacDonald to an in-depth on-the-record interview.

Mr. Malley has previously made this proffer by telephone, and was informed on April 4, 1973, that such a meeting at this time would be premature.

Your letter indicates that you feel that recent publicity in regard to this matter stemmed from the release of information by persons connected with the Department of Justice, and that we "have made assurances to Mr. Malley that corrective steps have been taken in this regard." This is simply not the case. We advised Mr. Malley that the Department of Justice has released no information and has declined to comment on this matter since it involves a possible criminal prosecution which is still under investigation. We also advised Mr. Malley that reporters are apparently receiving their information from Mr. Kassab, and that articles published in the New York *Daily News* predicting an indictment date are mere speculation.

When the time is appropriate, we will contact you and Mr. Malley and afford you an opportunity to make your presentation.

Sincerely,

HENRY E. PETERSEN
Assistant Attorney General
Criminal Division

By: /s/ Carl W. Belcher—A.L.H.
CARL W. BELCHER
Chief, General Crimes Section

May 17, 1973

Address replies to:

536 Mission Street
Suite #210
San Francisco, California 94105
Telephone: 415-391-7800 Ext. 372

Carl W. Belcher, Esq.
Chief, General Crimes Section
United States Department of Justice
Washington, D.C. 20530

Re: Dr. Jeffrey MacDonald
Your File: HEP:CWB:GK:mdz
90-1-7-54

Dear Mr. Belcher:

I want to acknowledge receipt of your letter dated May 3, 1973. I look forward to the opportunity of discussing the MacDonald matter with you.

Sincerely,

BERNARD L. SEGAL

BLS:ben

January 8, 1974

Address replies to:

536 Mission Street
Suite #220
San Francisco, Calif. 94105
Tel. 415-391-7800 ext. 372

Carl W. Belcher, Esq.
Chief, General Crimes Section
United States Department of Justice
Washington, D.C. 20530

Re: Dr. Jeffrey MacDonald
Your File: HEP:CWB:GK:mdz
90-1-7-54

Dear Mr. Belcher:

It is with some reservations that I write this letter to you to inquire about the status of your Department's review of the investigation of the deaths of the MacDonald family at Ft. Bragg, North Carolina. However, in fairness to my client who has lived with the twin tragedies of those deaths and the unfounded suspicion of himself in connection with them, that I ask whether a final decision has been made in connection with any Federal criminal action against him. If such a decision has not yet been made may I inquire as to when we may reasonably expect it to be made.

I again renew to you our previously stated offer to submit Dr. MacDonald to full questioning by attorneys of the Department of Justice.

Sincerely,

Bernard L. Segal

cc: Michael Malley, Esq.
BLS:jg

UNITED STATES DEPARTMENT OF JUSTICE
Washington, D.C. 20530

January 23, 1974

Mr. Bernard L. Segal
536 Mission Street
Suite #220
San Francisco, California 94105

Re: Dr. Jeffrey MacDonald
File No. 90-1-7-54

Dear Mr. Segal:

This is in response to your letter of January 8, 1974 inquiring as to whether a final decision has been made regarding Federal criminal prosecution arising from the murders of Colette, Kimberly and Kristen MacDonald.

For your information, this case is under active investigation and will remain under consideration for the foreseeable future.

I do not believe it would serve any useful purpose at this time to accede to your request that Jeffrey MacDonald be questioned by attorneys from the Department of Justice.

Sincerely,

HENRY E. PETERSEN
Assistant Attorney General

By: /s/ Carl W. Belcher
CARL W. BELCHER
Chief, General Crimes Section
Criminal Division

cc: Michael Malley
1250 Conn. Ave.
Wash., D.C. 20036

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JOHN R. KRONENBERG
UNITED STATES MAGISTRATE

No. MG75-3024M

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JEFFREY ROBERT MCDONALD, DEFENDANT

TRANSCRIPT

Proceedings of January 29 and 30, 1975

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* * * *

[209] Your Honor, there is, I am sure, some questions about the five-year period of time in here. This case has been investigated over a five-year period of time. It was not until very recently that the FBI Laboratory came into the case. Previously, the investigation of the case from a scientific viewpoint was by the Army CID Lab.

At the time of the Article 32 hearing in 1970 when Dr. McDonald was released from the Army charges, much of the [210] scientific evidence that I've made available to you today was not available to the hearing officer at that time.

THE MAGISTRATE: But this evidence has been gone over—this evidence is four or five years old now . . .

MR. STROUD: Yes. The evidence with regard to the pajama top, the bath mat and the sheet: All that evidence has been produced within the last five months by the FBI Lab.

THE MAGISTRATE: But that evidence—the analysis of that evidence was within the last five months, is that correct?

MR. STROUD: Yes, sir. The evidence was in existence the whole time. The bloody sheet, the bath mat and the—

THE MAGISTRATE: The time—three to four years passed between the creation of the evidence and its analysis?

MR. STROUD: That's correct.

THE MAGISTRATE: Very well.

MR. STROUD: We were not—Because the FBI Lab, because of Government bureaucracy, did not come into the case, and we were unable to get them into the case until the beginning of this Grand Jury.

Prior to that time, the Army CID Lab out of Fort Gordon handled it, and they do not have the sophistication that the FBI Lab has, and they will admit that.

THE MAGISTRATE: It seems strange to me that they would have a four-week hearing. They did have a four-week hearing, didn't they?

MR. STROUD: The Article 32 hearing was longer than four weeks.

THE MAGISTRATE: And yet not conduct an adequate analysis.

[211] MR. STROUD: Well, Your Honor—

THE MAGISTRATE: It seems odd, doesn't it, Counsel?

MR. STROUD: Well, it took them a long time to analyze the evidence, Your Honor. And at the time of the completion of the presentation of evidence at the Aricle 32 hearing, many of the scientific results even from the CID Lab weren't back, even though the hearing was for a long period of time.

THE MAGISTRATE: All right; you may proceed.

MR. STROUD: Now, it's my position, on behalf of the Government, with regard to bail that of course the fact that there's no question that in the past the defendant has been cooperative. When he was subpoenaed before the Grand Jury, he appeared, as he's indicated.

Back in the Article 32 hearing, he was in custody.

He did have an officer with him, assigned to him, as Mr. Segal explained to you. He was, more or less, I believe they call it house arrest at the BOQ. And then, of course, once he was released on the charges, he was no longer required to have another Army officer with him. Shortly after that, he was discharged from the Service.

Since that time, it's been speculation as to what the outcome of this case might be. Now he knows that a Grand Jury in the Eastern District of North Carolina has indicted him--22 people. I don't know how they voted. But there were 22 people on the Grand Jury and they indicted him. They feel like there's probable cause to believe that he committed the first degree murders of his wife and his two children.

Now, that's certainly going to cause a change in his

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REPORT AND CONCLUSIONS
PROCEEDINGS UNDER ARTICLE 32
UNIFORM CODE OF MILITARY JUSTICE

By Colonel Warren V. Rock
Presiding Officer

Filed October 13, 1970

[SEAL]

DEPARTMENT OF THE ARMY

HEADQUARTERS
UNITED STATES ARMY

John F. Kennedy Center for Military Assistance
Fort Bragg, North Carolina 28307

27 Nov. 1970

ATCMA-CG

Captain Jeffrey R. MacDonald
Headquarters and Headquarters Company
6th Special Forces Group (Abn)
1st Special Forces
Fort Bragg, North Carolina 28307

1. The inclosed copy of the report of the Article 32 investigating officer on the charges preferred against you on 1 May 1970 is furnished in response to your verbal request. You may also retain the copy of the verbatim transcript of witness testimony now in the hands of your appointed counsel, Captain James F. Douthat.

2. No copies of this material have been released to any person other than agencies of the government officially interested.

/s/ Edward M. Flanagan, Jr.
EDWARD M. FLANAGAN, JR.
Major General, USA
Commanding

Incl
as

CF:
TJAG, ATTN: JAGA

SUMMARIZED RECORD OF PROCEEDING
UPO ARTICLE 32, UCMJ
UNITED STATES versus
CAPTAIN JEFFREY R. MACDONALD

The investigation commenced at 1300 hours, 15 May 1970, at Fort Bragg, North Carolina. In attendance were the Investigating Officer, Colonel Warren V. Rock; the accused, Captain Jeffrey R. MacDonald, who was represented by his appointed counsel, Captain James F. Douthat. Also present were counsel for the government, Captain Clifford L. Somers; Captain Hammond A. Beale, Jr., legal advisor to the investigating officer; and Sergeant James R. Elkins, a clerk.

Colonel Rock informed the accused of his rights under Article 31, Uniform Code of Military Justice, and asked the accused whether or not he understood those rights as read to him. The accused responded, "Yes, sir".

Colonel Rock read to the accused verbatim each charge and specification, informed the accused of the name of the accuser, and each witness so far as known by the Article 32 officer. Those witnesses were as listed on page one of the Charge Sheet.

Colonel Rock informed the accused of his rights to counsel. Specifically, he informed the accused that he could retain civilian counsel at his own expense. Captain Douthat, the appointed defense counsel, stated that Mr. Bernard L. Segal and Mr. Dennis H. Eisman, whose address is Needleman, Needleman, Segal and Tabb, Suite 600, One East Penn Square Building, Juniper Market Street, Philadelphia, Penn. 19107, had been retained by the accused at his own expense.

Colonel Rock informed the accused that he could have military counsel of his own selection if reasonably available. Captain Douthat, the appointed Defense Counsel, stated the accused desired to be represented by Captain William deF. Thompson of the Office of the Staff Judge Advocate, 82d Airborne Division, Fort Bragg, North Carolina. Captain Douthat further stated that this re-

quest had been made in writing on 1 May 1970 to the Commanding General, XVIII Airborne Corps and Fort Bragg, Fort Bragg, North Carolina. On 14 May 1970, the Commanding General stated that Captain Thompson had been made available to act as Assistant Trial Counsel in this case. Therefore, Captain Thompson was determined to be not reasonably available to act as individual defense counsel for the accused. Captain Douthat stated that he is appealing this decision. (Exhibit 1)

Captain Douthat stated that the accused desired to be represented by 2LT Michael J. Malley, and further stated that he formally requested Lt Malley on 1 May 1970, in correspondence addressed to the Commanding General, XVIII Airborne Corps and Fort Bragg, Fort Bragg, North Carolina. He stated that to date no action had been taken on this request. (Exhibit 2) In order to expedite this request, Captain Douthat stated that he had written to the Chief, Personnel Operations, Attn: OPO-OPAD (Maj Johnston), DA, Washington, D.C., and submitted to Colonel Rock a copy of the letter, (Exhibit 3)

Colonel Rock advised the accused that he was entitled to be represented by counsel appointed by the officer exercising general court-martial jurisdiction. Captain Douthat stated that he believed himself to be such counsel. Colonel Rock asked the accused whether or not he desired to be represented by Captain Douthat. The accused stated, "Yes, sir". Colonel Rock determined that Captain Douthat was qualified under the provisions of paragraph 27(b) of the Uniform Code of Military Justice, and has been certified by The Judge Advocate General of the Army.

Before proceeding further, Colonel Rock asked the accused whether or not he had any objections to continuing with the procedural matters in the absence of his retained civilian attorneys, Mr. Segal and Mr. Eisman, or his requested individual military counsel, Captain Thompson and Lt Malley. The accused stated he had no objection.

Colonel Rock noted that the government was represented at these proceedings by Captain Somers. He then determined that Captain Somers was qualified under the provisions of paragraph 27(b) of the Uniform Code of Military Justice and has been certified by The Judge Advocate General.

Colonel Rock stated that because of the nature of this case, he had requested that a legal advisor be made available to him for the Article 32 investigation. He determined that Captain Hammond A. Beale, Jr., had been made available, was qualified under the provisions of paragraph 27(b), UCMJ, and was certified by The Judge Advocate General.

Colonel Rock then read to the accused applicable portions of paragraph 34, Manual for Courts-Martial, 1969, Revised Edition, reference the procedure for conducting an Article 32 investigation. The investigating officer then stated to the accused that he would consider any defense requests. to include requests for examination of the evidence. Captain Douthat then orally requested the following:

1. Any and all photographs of the scene;
2. All autopsy reports;
3. All laboratory reports;
4. The medical records of the accused;
5. Transcription of the taped interview of the afternoon session with the accused;
6. The tape records of interviews of the accused; and
7. In the event the tapes cannot be made available to the accused, then re-recordings of the tapes.

The investigating officer then inquired of Captain Somers when the government would be ready to proceed with the presentation of evidence. Captain Somers stated he would be ready to proceed in approximately two weeks. When the investigating officer asked Captain Douthat when the Defense would be prepared to proceed with the substance of the Article 32, Captain Douthat responded that at this time he could not state when the defense would be ready to proceed. Colonel Rock stated that the Article 32 investigation would continue at 0900 hours, 1 June 1970. The session was terminated at 1400 hours, 15 May 1970.

I have examined the foregoing summarized record and find it to be true and accurate to the best of my knowledge.

WARREN V. ROCK
Colonel, Infantry
Investigating Officer

Carol Butner	San Angelo, Texas enroute to Okinawa	E-4
1LT Edwin Casper	Flight Training School Fort Wolters, Texas	E-5
Winnie Casper	400 North 25th Street Mineral Wells, Texas	E-6
Robert H. Caverly	Federal Bureau of Investigation Fayetteville, North Carolina	E-7
SP4 Craig Chamberlain	USA Criminal Investigation Laboratory Fort Gordon, Georgia	E-8
John W. Chester	Post Office Box 767 Pinehurst, North Carolina	E-9
Susan Chester	Post Office Box 767 Pinehurst, North Carolina	E-10
Barbara Daw	119 LeBlanc Fort Bragg, North Carolina	E-11
CW2 Cornelius Daw	HHC, 6th Special Forces Group Fort Bragg, North Carolina	E-12
SGT Robert J. Duffy	Co A, 503d Military Police Battalion Fort Bragg, North Carolina	E-13
Bobbie Sue Evans	426 Champagne Street Hamlet, North Carolina	E-14
DR Russell S. Fisher	111 Penn Street Baltimore, Maryland 21201	E-15 C-111
MAJ George E. Gammel	Womack Army Hospital Fort Bragg, North Carolina	E-16
CW3 Franz J. Grebner	Detachment B, 3d Military Police Gp (CI) Fort Bragg, North Carolina	E-17
CPT William F. Hancock	Womack Army Hospital Fort Bragg, North Carolina	E-18
CWO Bennie Hawkins	HHC, 503d Military Police Battalion Fort Bragg, North Carolina	E-19
DR Fredrick Herter	Columbia Presbyterian Hospital New York, New York	E-20
SP7 William F. Ivory	503d Military Police Battalion Fort Bragg, North Carolina	E-21

MAJ Severt Jacobson	Womack Army Hospital Fort Bragg, North Carolina	E-22 G-40
James G. Judson	Spring Lake Police Department Spring Lake, North Carolina	E-23
CW3 Donald L. Kalin	573d Personnel Service Company Fort Bragg, North Carolina	E-24
Pamela Kalin	542 Castle Drive Fort Bragg, North Carolina	E-25
Alfred Kassab	22 Bonnie Lane Stoney Brook, New York	E-26
COL Robert Kingston	1st Cavalry Division Republic of Vietnam	E-27
Josephine S. Kingston	2609 Ala' Wai Boulevard Honolulu, Hawaii	E-28
Elizabeth Ann Krystia	301 Spear Drive Fott Bragg, North Carolina	E-29
Carolyn Landen	2609 Downs Place Fayetteville, North Carolina	E-30
DR Paul Manson	1025 Hancock Street Quincey, Massachusetts	E-31
DR Robert McGann	9 Hawthorne Street Boston, Massachusetts	E-32
MSG Hilyard Medlin	USA Criminal Investigation Laboratory Fort Gordon, Georgia	E-33
SP4 Kenneth C. Mica	Co A, 503d Military Police Battalion Fort Bragg, North Carolina	E-34 G-3
CPT Frank Moore	HHC, USAJFKCENMA Fort Bragg, North Carolina	E-35
Jean M. Morrell	2615 Gerard Avenue Evanston, Illinois	E-36
SP4 Dennis Morris	Co A, 503d Military Police Battalion Fort Bragg, North Carolina	E-37
Marjorie Murdock	425 W. 21st Street New York, New York	E-38
CPT William P. Neal	Womack Army Hospital Fort Bragg, North Carolina	E-39

SP6 Michael D. Newman	Medical Company, Womack Army Hospital Fort Bragg, North Carolina	E-40 G-11
Vernon C. Park	Pelham, North Carolina	E-41
1LT Joseph L. Paulk	Co C, 503d Military Police Battalion Fort Bragg, North Carolina	E-42 G-2
William E. Posey	505 Myrtle Street Fayetteville, North Carolina	E-43
DR Robert L. Sadoff	The Benjamin Fox Pavillion Jenkintown, Pennsylvania	E-44
WO1 Robert B. Shaw	Detachment 1, 3d Military Police Gp (CI) Fort Bragg, North Carolina	E-45
Jan Snyder	Route 3 Fairmont, North Carolina	E-46
Robert K. Stern	1 Great Oaks Road New Hope, Pennsylvania	E-47
MAJ William H. Straub	Womack Army Hospital Fort Bragg, North Carolina	E-48 G-10
John D. Sutton	110 Spring Avenue Spring Lake, North Carolina	E-49
SGT Richard D. Tevere	Co A, 503d Military Police Battalion Fort Bragg, North Carolina	E-50 G-4
1LT Mary Thoesen	Womack Army Hospital Fort Bragg, North Carolina	E-51
CPT Richard C. Thoesen	HHC, 7th Special Forces Group Fort Bragg, North Carolina	E-52
MSG Leo J. Violetti	Medical Company, 6th Special Forces Gp Fort Bragg, North Carolina	E-53
SSG David Weiss	Provost Marshal Investigator Fort Bragg, North Carolina	E-54
CPT James N. Williams	HHC, 6th Special Forces Group Fort Bragg, North Carolina	E-55
William G. Wolfgang	407 Belmont Drive Cherry Hill, New Jersey	E-56

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BEST COPY AVAILABLE

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1. 544 Castle Drive, Fort Bragg, North Carolina, and the contents therein

2. One (1) white bath towel with word "HILTON" and red brown stains (Exhibit G-73)

3. Blue pajama top which is torn and has red brown stains (Exhibit G-74)

4. Pocket from blue pajama top (Exhibit G-75)

5. Wooden stick approximately 30" x 1 1/2" x 1 1/2" (Exhibit G-79)

6. "Old Hickory" brand paring knife (Exhibit G-82)

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8. Small paring knife marked "Stainless - Geneva Forge", with bent blade (Exhibit G-84)

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10. Sample of floppy hat (Exhibit A-42)

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13. Blue top sheet from bed in EAST bedroom (Exhibit R-9)

14. Multi-colored bedspread from bed in EAST bedroom (Exhibit R-10)

DEPARTMENT OF THE ARMY
HEADQUARTERS, 6TH SPECIAL FORCES GROUP (AIRBORNE), 1ST SPECIAL FORCES
Fort Bragg, North Carolina 28307

ATCMA-SF6-CO 2 May 1970

SUBJECT: Court-Martial Charges in the Case of Captain Jeffrey R. MacDonald, 112-34-8378, HHC, 6th SFG(Abn), 1st SF

Commanding General
U.S. Army John F. Kennedy Center for Military Assistance
Fort Bragg, North Carolina 28307

1. In compliance with paragraph 32f(4), MCM, 1969, there are forwarded herewith (Incl 1) court-martial charges which probably will not be disposed of either under Article 15, summary court-martial or by reference to a special court-martial.

2. Summaries of expected testimony and documentary evidence is with Det B, 3d MP Group (CI), Fort Bragg, N.C.

3. All material witnesses are expected to be available at the time of trial.

4. There is no admissible previous convictions of accused (para 75b(2), MCM, 1969).

5. The character of the accused's military service prior to the offenses charged has been excellent.

6. I recommend trial by general court-martial.

/s/ Francis B. Kane Jr.
FRANCIS B. KANE JR.
Colonel, Infantry
Commanding

1 Incl
as

Charge: Violation of the Uniform Code of Military Justice, Article 118

Specification 1: In that Captain Jeffrey R. MacDonald, U.S. Army, Headquarters and Headquarters Company, 6th Special Forces Group (Airborne), 1st Special Forces, did, at Fort Bragg, North Carolina, on or about 17 February 1970, with premeditation, murder Collette S. MacDonald, by means of striking her on the head with a club and stabbing her in the chest with a knife.

Specification 2: In that Captain Jeffrey R. MacDonald, U.S. Army, Headquarters and Headquarters Company, 6th Special Forces Group (Airborne), 1st Special Forces, did, at Fort Bragg, North Carolina, on or about 17 February 1970, with premeditation, murder Kimberly K. MacDonald, by means of striking her on the head with a club and stabbing her in the chest and neck with a knife.

Specification 3: In that Captain Jeffrey R. MacDonald, U.S. Army, Headquarters and Headquarters Company, 6th Special Forces Group (Airborne), 1st Special Forces, did, at Fort Bragg, North Carolina, on or about 17 February 1970, with premeditation, murder Kristen J. MacDonald, by means of stabbing her in the chest and back with a knife.

SUBJECT: Court-Martial Charges in the Case of Captain Jeffrey R. MacDonald, 112-34-8378, HHC, 6th SFG(Abn), 1st SF

HEADQUARTERS, UNITED STATES ARMY JOHN F. KENNEDY CENTER FOR MILITARY ASSISTANCE, Fort Bragg, North Carolina 28307 12 May 1970

TO: COL Warren V. Rock, Headquarters, Staff and Faculty Company, Institute Brigade, U.S. Army North Carolina 28307

1. You are designated to investigate the inclosed charges against Captain Jeffrey R. MacDonald, 112-34-8378, Headquarters and Headquarters Company, 6th Special Forces Group (Abn), 1st Special Forces, Fort Bragg, North Carolina 28307.

2. Your investigation will be conducted in conformity with paragraph 34, MCM, 1969 (Rev.), and Article 32, UCMJ.

3. You will contact the Office of the Center Judge Advocate for guidance and assistance prior to the commencement of the investigation.

4. The conduct of your investigation will take precedence over all other duties and responsibilities. A report of your investigation will be submitted in sextuplicate on DD Form 457 (Appendix 7, MCM, 1969 (Rev)) to reach this headquarters not later than 72 hours after receipt of this communication. If a delay in the completion of your investigation is required for good cause, you will furnish this headquarters periodic reports of your progress and the reasons for delay.

FOR THE COMMANDER:

/s/ Richard A. Baker
RICHARD A. BAKER
CPT, JAGC
Actg Asst Adj Gen

SUBJECT: Court-Martial Charges in the Case of CPT Jeffrey R. MacDonald, 112-34-8378, HHC, 6th Special Forces Group (Abn), 1st Special Forces

Headquarters, Staff and Faculty Company, Institute Brigade, United States Army Institute for Military Assistance, Fort Bragg, North Carolina 28307 15 May 1970

TO: Commanding General, ATTN: JA, United States Army John F. Kennedy Center for Military Assistance, Fort Bragg, North Carolina 28307

1. The subject Article 32 investigation was commenced at 1300 hours, 15 May 1970. After resolving some preliminary matters, I granted a delay in the proceedings, at the request of both counsel for the government and defense, until 0900 hours, 1 June 1970.

2. The defense counsel requested that the following evidence, listed on page one of the Charge Sheet, which the government has in its control be made available to the defense as soon as possible:

a. Any photographs of the alleged murder scene.

b. Autopsy reports.

c. Laboratory reports.

d. Medical records of the accused.

e. A transcript of the afternoon tape recordings of an interview with the accused.

f. All tape records of any interviews with the accused for purposes of rerecording by the defense.

3. Please advise if and when such evidence will be available to the defense.

/s/ Warren V. Rock
WARREN V. ROCK
Colonel, INF
Investigating Officer

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II

OPENING STATEMENT AND EXPLANATORY REMARKS

In order to fully appreciate and understand this report and its voluminous contents, it is deemed necessary to explain the rationale of the system adopted to report the same.

A verbatim transcript of the proceedings was taken and is included in this report in the order in which witnesses have testified. However, because of its obvious length and because much of the transcript does not concern itself with the relevant questions of the truth of the allegations, a summarized version of pertinent testimony was made (TAB V). All references to page numbers refer to the verbatim transcript.

In view of the fact that both government and defense were represented by counsel, the hearing was conducted in generally the same format as a trial. Government presented its evidence and rested, defense did likewise and finally the Article 32 Officer called for witnesses and evidence. In all instances opposing counsel was given the full right of cross examination. It was necessary to give considerable latitude to counsel and permit the introduction of some hearsay-type evidence for both sides. The legal advisor sat next to the Investigating Officer throughout the hearing and his sole function was to assist him in making proper legal rulings on all questions that arose.

When it became apparent that there would be a large number of exhibits offered by both sides, a system of numbering exhibits was established as follows: Government exhibits are G——, defense exhibits are A——, and my exhibits are R——. All other exhibits are numbered E——; e.g.; the sworn testimony of the witnesses.

It was necessary to devise a coding system to assist in understanding the results of the CID Laboratory Reports from Fort Gordon, Georgia, (see Exhibit E-59). Thereafter, these symbols were transferred to the Lab Reports and placed to the left of the particular exhibit. It is important not to confuse the 10's exhibit numbers (G, A, R and E) with the exhibit numbers used by the Lab. The meaning of their particular numbering and lettering system is explained in the Prefix Key (Exhibit G-27). Diagrams are provided of each room of the house (G-20 thru G-25) showing the approximate location of certain blood samples and the blood type when identified. Expanded diagrams of the floors, walls and ceilings (G-87 thru G-96) show additional blood locations and, in red ink, the location of identified/unidentified latent finger and palm prints.

For purposes of this report bedrooms are referred to by compass direction. The EAST bedroom is the same as the master bedroom (where COLETTE and the ACCUSED were found), the SOUTH bedroom the same as the front bedroom (where KIMBERLY was found) and the NORTH bedroom the same as the rear bedroom (where KRISTEN was found).

Throughout the transcript and summarized testimony there are references to blood types. It is important to remember that the blood types for the MACDONALD family are as follows: COLETTE—"A"; the ACCUSED —"B"; KRISTEN, the youngest daughter—"O"; and KIMBERLY, the oldest daughter—"AB".

When one reads the verbatim transcript, there are, in many instances, many pages devoted to a seemingly important issue. Thereafter, in the summarized testimony there is no mention made. It is essential to understand that because of the bizarre nature of the case, the Article 32 Investigator sometimes proceeded down blind alleys resulting in answers which, in the final analysis, were neither relevant nor necessary to his recommendation. Therefore, such areas of inquiry are excluded from specialized treatment in the end product.

It is suggested that the reviewer read the verbatim transcripts of testimony of the ACCUSED, pages M-1-M-160 (Volume XIII); the two psychiatrists, DR SADOFF, pages 1234-1269 (Volume XI), and LTC BAILEY, pages 1557-1599 (Volume XV); MR POSEY, pages 1297-1342 (Volume XII); and MR IVORY'S testi-

mony reference STOKELY, pages 1508-1556 (Volume XIV).

The chronology of the hearing was as follows:

15 May 70—

Hearing held, delay granted until 1 June 70; further delays granted to defense until 6 Jul 70.

6 Jul-24 Jul 70—

Hearings held. Government completed case; defense granted delay until 10 Aug. 70.

10 Aug-15 Aug 70—

Hearings held.

15 Aug-8 Sep 70—

Delay for mental hygiene evaluation of ACCUSED at Walter Reed General Hospital, Washington, D.C.

8 Sep-11 Sep 70—

Hearings held.

12 Sep-13 Oct 70—

Preparation of Report of Article 32 Proceedings.

III

RECOMMENDATIONS

In the interest of military justice and discipline, it is recommended that:

1. All charges and specifications against CAPTAIN JEFFREY R. MACDONALD be dismissed because the matters set forth in all charges and specifications are not true. There are no lesser charges and/or specifications which are appropriate.

2. That appropriate civilian authorities be requested to investigate the alibi of HELENA STOKELY, Fayetteville, North Carolina, reference her activities and whereabouts during the early morning hours of 17 February 1970, based on evidence presented during the hearing.

IV

REASONS FOR RECOMMENDATIONS

A. Rationale for Recommendation Number One.

(General) The rationale for recommendation number one is based on two major lines of inquiry; first an analysis of the sworn testimony of the ACCUSED and evidence to support his version of the events on the night of 16-17 February and, secondly, an analysis of the government's evidence to refute his statements and testimony. A careful examination was made of the government's charges and its theory of how the crimes were committed as enunciated in the closing argument.

B. Analysis of the ACCUSED's Case.

In summary the ACCUSED states that four (or possibly more) unidentified assailants attacked him when he awoke on the couch in the living room of his apartment to the sounds of screaming by his wife (COLETTE) and cries for help from both COLETTE and the oldest daughter (KIMBERLY). During a short lived struggle with the assailants he received numerous blows, the most significant being a hit on the head and a hard punch (knife wound) to the chest. He fell into the hallway and apparently was unconscious for an unknown period of time. Upon regaining consciousness he attempted, on several occasions, to resuscitate the members of his family and telephoned for assistance.

C. The following is a list of evidentiary factors supportive of the ACCUSED:

(1) The ACCUSED was subjected to two separate psychiatric evaluations: the first sponsored by counsel for the accused and the second, at the request of the Investigating Officer, by a team of three Army psychiatrists at Walter Reed General Hospital. Although there is a four month time span between the two evaluations, there is striking similarity in the conclusions. Basically they be-

lieve he is now sane and was sane on 16-17 February and is experiencing a normal reactive depression following the events. Both feel that the ACCUSED was not trying to hide any facts from then and, had he been, they would have been able to detect it. They were favorably impressed that he could not remember all details and that he freely admitted this fact.

The psychiatrists also state that it is unusual to be asked, as the Investigating Officer did, if an accused is "capable" of committing a certain act. The only major area of disagreement arose in answering this question. The ACCUSED's psychiatrist, who specializes in forensic psychiatry, stated the ACCUSED was not capable of committing the crimes and would have become psychotic if he had; the Army psychiatrists did not think this question could be answered by a psychiatrist.

(2) A significantly large number of character witnesses testified in behalf of the ACCUSED. The testimony covers a life span from age 12, through high school, college, medical school, internship and military service. They testify to his qualities in what can best be described as "The ALL American Boy". In those instances where it was appropriate to comment upon his marital and family relationships it was in terms of a loving husband and father.

(3) The ACCUSED, prior to the time he was formally charged with the murders, was willing to answer questions freely. On 17, 18 and 19 February he gave interviews to FBI and CID agents and on 6 April he answered questions in two lengthy sessions with three CID agents. Finally, he provided sworn testimony at the hearing itself which was subjected to extensive cross examination by the government.

(4) Five of the six doctors who testified stated that the ACCUSED could not predict the medical consequences of the stab wound in his chest if it was self-inflicted. The ACCUSED sustained a 40% pneumothorax (partial lung collapse). All agreed that the location of the wound was such that other vital organs could have been damaged with a greater life threatening potential.

(5) The ACCUSED's statements, from 17 February to his sworn Article 32 testimony, relative to the events of 16-17 February have been substantially the same in all important aspects. Explanation for any discrepancies are logical based on the testimony of the psychiatric experts, the time factor, his natural attempt to forget the horrible sights of 17 February, normal human failure to remember routine actions and the confusion following the blow to his head.

(6) There is, generally speaking, a logical explanation for the location of blood types where found.

(7) After listening to the lengthy testimony of the ACCUSED in the hearing room and closely observing his actions and manner of answering questions it is the opinion of the Investigating Officer that he was telling the truth.

(8) Medical laboratory tests conducted on specimens from COLETTE MACDONALD and the ACCUSED revealed no use of narcotics or habit forming drugs nor was either individual intoxicated on 16-17 February 1970.

(9) There is conflicting evidence as to the degree the crime scene was preserved from the time the first MP arrived on the scene and until photographs were taken some minutes later. The controversy specifically relates to the fact of whether or not the white towel and blue pajama top were on COLETTE's body when first seen by the MPs, the location of the handset of the telephone in the EAST bedroom, the relocation of the white flower pot holder in the living room by some unknown individual and the number (12 to 14) of military police, CID agents, and medical personnel initially in the apartment and their movements through the rooms with the chance of inadvertantly altering the crime scene.

(10) A significant number of fingerprints taken from the apartment remain unidentified.

(11) Only one of the four weapons alleged to have been used in the commission of the crime (a stick/club) can be identified as coming from the ACCUSED's residence.

(12) During the course of the hearing CID Agents IVORY and SHAW testified that they had kicked, pushed

and/or knocked over the coffee table in the living room and it did not come to rest on its edge. On the Investigating Officer's second visit to the MACDONALD apartment he knocked over the coffee table in the living room. The table struck the adjacent chair and landed on its edge.

(13) Considering all known facts about the life and previous history of the ACCUSED up to and including 17 February no logical motive was established for the ACCUSED to have committed such brutal murders, either singly or in any combination.

(14) Because of the manner in which the victims were murdered it is reasonable to conclude that the crimes were committed by persons who were either insane or under the influence of drugs or narcotics. The ACCUSED testified to treating addicts in the emergency rooms of Womack Army Hospital and in two local civilian hospitals. Witnesses testified that the unit chaplain said, at a drug lecture, that a doctor-patient conversation is not privileged. Following this lecture there was a noticeable drop in the number of soldiers seeking appointments with the ACCUSED in his capacity as medical drug counselor and he was reportedly considered a fink".

(15) A flowered jewelry box located on COLETTE's dresser in the EAST bedroom had reddish brown stains inside and one latent fingerprint and one latent palmprint, both unidentified. Apparently two of the several rings requested by the ACCUSED have not been located and it is possible that assailants searched this box for valuables.

(16) Wax from a multi-colored candle not from the ACCUSED's residence was found on the bed spread and a chair in the SOUTH bedroom and also on the coffee table in the living room. This wax could be from a candle used by the female assailant.

(17) The autopsy report on the body of COLETTE shows that blond hair was found in her right hand. MAJ GAMMEL, the pathologist who conducted the autopsy, testified that this hair was four to five inches in length. To date this hair has not been identified.

(18) One witness (POSEY) observed a girl (STOKELY) coming home in a car with at least two males during

the early morning hours (0345-0430) on 17 February in the Haymount section of Fayetteville, North Carolina. He described her as a "hippie" type who frequently wore attire similar to the ACCUSED's description of the female assailant. The girl told POSEY she was "stoned" and had no alibi for her whereabouts that night. She was subsequently interviewed by CID Agent IVORY and he obtained the same information.

POSEY, a reluctant witness, testified on 13 August. He had never previously provided this information to police authorities stating he was fearful of the possible consequences from members of the hippie community.

D. Analysis of the Government's Case.

The government's theory of the events is that the ACCUSED and his wife had an argument in the EAST bedroom concerning the baby's (KRISTEN) wetting of their bed. The argument escalated into a fight. COLETTE and a knife and stabbed him. He obtained a club and beat her and, with each stroke, became angrier and lost ". . . all control in a blind fantastic mindless rage. . . ." KIMBERLY came into her parents' room and he smashed her skull and then placed her in her own bed.

The ACCUSED then regained his senses and, realizing he needed a cover story, decided to blame the murders on hippies. He next went to KRISTEN's room and killed her. His wife, still alive, came into KRISTEN's room. He hit COLETTE again, dragged her back into the EAST bedroom and stabbed her. He then returned to KRISTEN's room, turned her over and stabbed her some more. Finally the ACCUSED hit and stabbed himself and telephoned for assistance.

The government's case against the ACCUSED is based principally upon the fact that there are certain questions raised for which the ACCUSED does not seem to have pat answers, belief that the scene in the living room is staged, that there is no real evidence of the presence of unidentified assailants, that three members of the family were murdered in a bizarre manner yet the ACCUSED remains alive and that the ACCUSED is lying.

E. The following is a list of evidentiary factors presented by the government with my analyses in parentheses.

(1) CID Agent IVORY testified that when COLETTE's body was removed he collected a blue thread on the rug where her head had rested, 20 to 25 blue fibers from the floor and rug of the EAST bedroom, three from the SOUTH bedroom, two from the NORTH bedroom (one of these was under KRISTEN's fingernail), one in the hallway and none in the living room. IVORY also stated that a pajama pocket from the ACCUSED's pajama top was found at COLETTE's feet.

CPT NEAL, the Army doctor who examined the deceased at the apartment, states that he turned over COLETTE's body to examine her. CID Agents IVORY and SHAW stated he did not move the body.

The government believes these blue threads/fibers came from the pajama top of the ACCUSED. The government also contends that the absence of fibers in the living room, where the ACCUSED states a short struggle occurred, and the profusion of fibers in the EAST bedroom where the government thinks the husband-wife struggle occurred, indicates that no struggle occurred in the living room and the scene was staged by the ACCUSED.

The ACCUSED stated that during his struggle with the assailants his pajama top, in some unknown manner, got twisted around his wrists. When he regained consciousness in the hallway he was face down with his hands under his abdomen and still entwined in the pajama top. He took off the pajama top and dropped it in the EAST bedroom. COLETTE's body was leaning against the green chair and he laid her out on the floor. Later, after checking her, he picked up the pajama top and spread it out over her chest area.

(The CID Laboratory report, concurred in by the testimony of a textile expert, qualifies the association of the fibers/threads to this garment by stating they "could have" come from the pajama top and therefore no positive identification could be made.

It is unknown when the pajama top was torn or when the pocket was ripped off the garment. It seems more

logical for this action to have occurred in the couch area of the living room. With the garment wrapped around the ACCUSED's arms, the fibers and pocket may have, in some manner, remained with the garment until it was dropped in the EAST bedroom or when it was opened up to be spread across the chest of COLETTE.)

(2) The ACCUSED states he used telephones in the EAST bedroom and in the kitchen and also pulled a paring knife from COLETTE's chest and discarded it in the bedroom. Witnesses described how one MP also picked up the telephone in the EAST bedroom using three fingers. The CID fingerprint technician testified that there were no fingerprints on these three objects, but smudges on the knife and telephone in the EAST bedroom. The government contends that it is strange that the kitchen telephone and the knife are devoid of fingerprints and theorize that the ACCUSED may have been wearing gloves.

(It seems logical that fingerprints would be on these three items. However, since only smudges appear on the telephone used by the MP it indicates that prints are not necessarily left on an object when used. In addition the ACCUSED thinks he washed his hands in the kitchen and this could have occurred prior to use of the telephone in that room thus further reducing the possibility of prints on that instrument.)

(3) Four pieces of evidence, suspected to be from a surgical glove(s) and bearing blood, were found in the EAST bedroom. One pice which was ¾ of a finger was in the bedding on the floor at the foot of the bed. The ACCUSED states one or more used pair of surgical gloves were on the kitchen sink (not present when the CID arrived) and usually a pair was on top of the dryer in the utility room for the use of COLETTE (also not present).

(The government's theory is that, in the latter stages of the crime, the ACCUSED donned the surgical gloves from the kitchen. The evidence as presented during the hearing does not support that theory.)

(4) The CID lab technician collected red brown stains from the west end of the hall floor which were later identified as Type "B" or Type "O" blood. The ACCUSED testified that he fell, face down, and was unconscious in

this general location with his arms under him and the pajama top entwined around his arms. The government contends that, if the stains are Type "B" blood and the ACCUSED's testimony is true, there should be a pool of blood in this location.

(From the Lab report and testimony regarding the stains it is not evident what quality of blood was at this location. In addition, several witneses testified that at least twelve military personnel were in the apartment and passed to and from through the hallway thus potentially disturbing the evidence. That blood present could have come from the chest wound with the pajama top absorbing blood from the abdominal wound.)

(5) CID Lab reports indicate that Type "O" blood (described by the government as a speck on the lens) was on the spectacles of the ACCUSED which were found on the floor in the living room. Also, that Type "AB" blood was on the top edge of an ESQUIRE magazine which was located under the edge of the overturned coffee table in the living room. KRISTEN had Type "O" blood and KIMBERLY had Type "AB" blood. The government contends that the ACCUSED wore his spectacles while committing the crimes.

(Considering the amount of blood evident in the killings of the two girls it is entirely plausible to consider that some of it contaminated the clothing of the assailants and their weapons and was subsequently transferred to the two above mentioned objects.)

(6) The family of the ACCUSED was brutally murdered while the ACCUSED suffered what the government describes as "superficial injuries". The government does not think that unknown assailants commiting such a crime would leave the ACCUSED alive.

(Although this is not evidence in the true sense of the word it is a factor to consider. Moreover, it seems logical that the assailants would be surprised to find the ACCUSED sleeping in the living room. The ACCUSED testified they hit him with a club and repeatedly with a sharp instrument. In the dark and in the absence of an inspection of the ACCUSED's body they could assume the

assault was as effective on him as on the other members of the family. When the ACCUSED fell into the hallway the assailants, by this time, were probably anxious to leave the premises and departed in haste.)

(7) Although not specifically stated by the government in the closing argument of the hearing, there is the implied lack of real evidence of the presence of assailants from outside the MACDONALD household.

(Evidence and/or unanswered questions leading to the possible conclusion that assailants were present as described by the ACCUSED is as follows: Numerous unidentified fingerprints on the premises; wax from an unknown candle apparently not from the MACDONALD household; unidentified blond hair in the right hand of COLETTE; red brown stains on the interior of a jewelry box in the EAST bedroom together with an unidentified finger and palm print; and, no evidence that the two knives and the ice pick, apparently used in the murders, came from the apartment.)

F. Rationale for Recommendation Number Two.

The rationale for recommendation number two is based on testimony presented at the hearing by a civilian witness POSEY which had never previously been presented to civilian police and/or military investigative authorities. There was a remarkable similarity of part of his testimony to testimony by the ACCUSED and other evidence.

As a result of this information the Investigating Officer requested that the government attempt to get a civilian female (STOKELY) whom POSEY had seen during the early morning hours of 17 February, to appear as a witness at this hearing. CID Agent IVORY testified that he subsequently interviewed her twice, that she had no alibi for that morning because she stated she had been on marihuana, and that she declined to testify.

It seems appropriate to pursue this line of inquiry further and to provide the testimony of POSEY and IVORY to appropriate local civilian authorities with a request that they determine if STOKELY and/or her companions of that evening can be placed at the scene of the crime.

V

SUMMARIZED TESTIMONY

A. GOVERNMENT

MISS CAROLYN LANDEN, Chief Group Operator with the Carolina Telephone Company, Fayetteville, North Carolina, testified that at approximately 0340 hours, 17 February 1970, she was notified by another operator that an unusual call was on her line. She heard the customer say, in a weak voice, ". . . 544 Castle Drive . . . that he had been stabbed . . ." (p6). She promptly notified the MPs by connecting the call with their line. After approximately 15 minutes elapsed, she ". . . could hear moving around in the background . . ." (p 12), from which sounds she concluded the MPs had arrived at 544 Castle Drive. (pps 5-14)

1LT JOSEPH L. PAULK, MP Duty Officer on 17 February 1970, testified that on the night in question, his desk sergeant received a telephone call. PAULK was summoned by him and in response to his statement that there was trouble at 544 Castle Drive, he and his driver proceeded there.

Upon checking the front door, he discovered it was locked so he sent MPs around back to check the rear entrance. As PAULK started towards his vehicle, one of the MPs shouted, ". . . they are around here. . . ." (p 27).

PAULK then entered the EAST bedroom and discovered, in addition to MPs MICA and TEVERE, COLETTE MACDONALD lying on her back on the floor, apparently dead, and the ACCUSED, lying beside his wife. MICA was assisting the ACCUSED. PAULK observed that the ACCUSED had some of the symptoms of shock and his speech was rather incoherent.

In PAULK's opinion, the ACCUSED expressed more concern about the condition of his wife and children than did he about his own condition. The ACCUSED repeatedly asked about the condition of his children and once stated, ". . . Oh, Jesus Christ, look at my wife. . . ." (p 34).

Prior to leaving the EAST bedroom, PAULK took note of the word "PIG" written in blood on the headboard of the bed. He also noticed a wet spot in the center of the bed.

Upon departing the EAST bedroom, he started down the hallway. He looked into the doorways of the NORTH and SOUTH bedrooms and assumed the children were dead because there was ". . . just absolutely no movement whatsoever. . . ." (p 104). Continuing down the hallway, PAULK entered the living room at which time he noted the dim lighting. After quickly looking into the kitchen and dining room, he began to take notes.

Thereafter, it was reported to him that the ACCUSED described his assailants as three (3) males (one Negro) and one female. PAULK caused this information to be put on the radio. At about this time PAULK also cautioned all MPs in the house not to move or touch anything, an instruction PAULK subsequently repeated several times. He saw grass on the carpet after MPs had entered the house and he ". . . halfway remembers a medic . . . not in uniform. . . ." (p 57).

PAULK used the phone next door in the CW3 KALIN apartment to notify COLONEL KRIMANEK (Post Provost Marshal) of the crime and PAULK also telephoned to MP desk sergeant (BOULWARE) to give him a description of the assailants and to request the desk to expedite the ambulances and CID.

PAULK was in the EAST bedroom more than three times, during one of these, he observed SGT TEVERE attempt to use the telephone. PAULK testified TEVERE picked up the receiver by using his index finger and thumb, thereafter replacing the handset on the cradle and subsequently placing the handset in a dangling position.

In addition PAULK heard the ACCUSED say, ". . . I'm going to kill those God damn acid heads. . . ." and ". . . I'm not going to help them any more. . . ." (p 95). (pps 15-113).

SP4 KENNETH C. MICA, Company A, 503d Military Police Battalion, Fort Bragg, North Carolina, testified that in the early morning hours of 17 February 1970, he was routinely patrolling the Corregidor Courts/Anzio Acres housing area with SP4 MORRIS. It was a rainy cold night. During this period he passed by the 544 Castle Drive area several times and did not notice anything unusual. Approximately 0345 hours his patrol received a radio call to proceed to 544 Castle Drive. Upon arriving he discovered three MP vehicles were already there.

After a futile attempt to gain entrance through the front door, SGT TEVERE came from the rear of the quarters and yelled, ". . . Tell them to get Womack ASAP. . . ." (p 116). When TEVERE and MICA entered the EAST bedroom through the rear door, MICA stated he observed COLETTE lying on her back and the ACCUSED lying on his stomach on top COLETTE's left shoulder. MICA testified that he observed COLETTE's midriff and a portion of her left breast she was not covered by a pajama top or white towel.

MICA turned the ACCUSED over and he said ". . . Check my kids. How are my kids. . . ." (p 117). MICA immediately ran down the hallway, glancing in both children's bedrooms and observed the children with his flashlight. Both children appeared dead. At the end of the hallway MICA briefly glanced into the living room—dining room area. Among the things he noticed was the overturned coffee table which was resting on its edge.

After returning to the ACCUSED in the East bedroom, MICA then remained with him until the medics arrived. During this period MICA administered mouth to mouth resuscitation at least three times because the ACCUSED would lose consciousness. At times the ACCUSED's teeth were chattering.

Among the statements MICA recalled the ACCUSED saying are, "I can't breathe, I need a chest tube. . . ."; ". . . how are my kids. Check my wife. . . .", "I heard my kids crying. I tried to feel my wife's pulse and I couldn't find it. . . ."; ". . . they kept saying acid is groovy, kill the pigs. Why did they do this to me. . . ." (pps 120-121).

MICA asked the ACCUSED what happened. The ACCUSED answered that there were four of them, one blond female with a big floppy hat and that she had a candle. She kept saying ". . . acid is groovy, kill the pigs. hit them again. . . ." The ACCUSED said there were ". . . three men and one woman, one Negro. I think I hit them. I think I scratched them. . . ." (p 142).

As MICA received this information, he repeated it and believed that PAULK was copying it down.

During the time MICA was attempting to administer first aid to the ACCUSED, the ACCUSED tried to struggle up from the floor to go check his children himself. MICA was then forced to restrain him. The ACCUSED repeatedly insisted that MICA leave him alone and attend to the children. MICA testified that the ACCUSED, when he was being taken from the house on a stretcher, struggled to get up and said, ". . . God damn MPs, let me see my kids. . . ." (p 147).

While in the EAST bedroom MICA recalls the ACCUSED describing some details of the attack upon him. Included therein were statements that he (ACCUSED) had been sleeping on the living room couch when he was awakened by the screams, that upon awakening the ACCUSED saw his assailants standing at the edge of the couch and that before he could get up they started hitting him while the woman was chanting.

MICA testified that at the time the accused was removed from the premises there were approximately 12-13 persons inside the apartment who were either MPs or medics. At this time MICA observed that the flower pot in the living room, which had apparently been sitting on the coffee table and had been thrown to the floor, was lying on its side on the floor, its contents spilled out. One of the persons in the living room, whom MICA believed was an ambulance driver, appeared to pick up the flower pot and set it on its base following which he sat on the couch. He was ordered to move and did so promptly.

MICA also testified that the MPs had been instructed by radio that as soon as someone got inside the house they were to pick up the phone and let the MP desk know what

the situation was. MICA observed TEVERE pick up the receiver and he believes TEVERE stated the line was dead. MICA stated that when he first observed the telephone, ". . . It was off the cradle and I believe it was laying on the dresser next to the phone. . . ." (p 162). (pps 115-165)

SGT RICHARD D. TEVERE, Company A, 503d Military Police Battalion, Fort Bragg, North Carolina, testified he was on MP patrol on 17 February 1970 when, at approximately 0350 hours, he was dispatched by radio to 544 Castle Drive. He was the first MP to enter the rear door and observe the victims in the EAST bedroom. After calling for assistance, he returned to the same bedroom, at which time he heard the ACCUSED ask him to check his children and the pulse in his wife's leg. In response to this, TEVERE next went two steps inside the SOUTH bedroom, shined his flashlight and saw a child that appeared to have been stabbed several times. Going from there to the doorway of the NORTH bedroom, he repeated this procedure and observed both a child that appeared to have been beaten and stabbed and a big puddle of blood on the floor.

Upon returning to the EAST bedroom, PAULK (MP duty officer) asked TEVERE how "bad" the children were and TEVERE responded they appeared to be "bad". TEVERE assumed they were dead. (p 189). While he was in the EAST bedroom on this occasion TEVERE picked up the telephone receiver (which was off the hook) with his thumb and two fingers in order to call the Provost Marshal's office. His attempt was futile, as TEVERE observed, ". . . It was dead. There was no dial tone. . . ." (pps 192-193). TEVERE stated he then ". . . placed the phone (receiver) right back where I got it from . . . along side the telephone. . . ." (p 193).

TEVERE testified that the ACCUSED described his assailants as two male Caucasians, one male Negro wearing a field jacket with sergeant stripes on it, one female with long blond hair wearing muddy boots, a floppy hat,

carrying a candle, saying acid is groovy and kill the pigs (p 211).

When he first observed COLETTE, TEVERE stated he noticed her left breast and midsection and does not recall seeing a blue pajama top (ACCUSED's) or white towel on her body.

Subsequently TEVERE went into the living room where he did not observe any wet spots or mud. TEVERE stated he was looking for mud because the ACCUSED had reported seeing a ". . . blond (woman) with . . . muddy boots. . . ." (p 201). In the living room, TEVERE noticed a white flower pot ". . . lying on its side . . ." on the floor (p 203). In the kitchen, which was lighted, he saw the telephone receiver dangling on the floor.

TEVERE agreed that there was a total of about a dozen MPs, CID or medics in the apartment during the approximate 15 minute period he was there. (pps 184-219).

SGT ROBERT J. DUFFY, Company A, 503d Military Police Battalion, Fort Bragg, North Carolina, testified that, as a result of a radio call, his patrol proceeded to 544 Castle Drive where he noticed two MP vehicles already had arrived.

DUFFY entered through the utility room and pushed past MICA who was standing in the doorway to the EAST bedroom. DUFFY stated he observed COLETTE lying on her back and the ACCUSED lying parallel to her on his side with his arms across her chest and his head on her shoulder. He observed the white towel over COLETTE's body but he does not remember seing any mud, water spots or debris on the floor of the EAST bedroom, despite the fact the room was brightly lighted.

When DUFFY heard the ACCUSED request that his children be checked, DUFFY proceed to the NORTH bedroom. After going in two or three feet, he saw KRISTEN bleeding from the neck and shoulder. Simultaneously DUFFY observed DICKERSON going towards the SOUTH bedroom. As DUFFY exited the NORTH bed-

room, DICKERSON stated there was a baby (KIMBERLY) that seemed to be dead in the SOUTH bedroom. DUFFY then ran out of the house to the utility room to call for medical assistance.

At approximately 0430 hours, DUFFY and MP (SP4) JACKSON were given instructions ". . . to walk around the house to see if we could find any bits of evidence. . . ." (p 256). JACKSON discovered an ice pick under a bush near the northeast end of the house and DUFFY observed it when JACKSON called his attention to it. DUFFY stated neither he nor JACKSON touched the item, rather, JACKSON left to inform higher authorities of his discovery. After JACKSON's departure, DUFFY continued the search and discovered a stick (club) (Exhibit G-79) outside the rear step of the back entrance to the utility room.

Among his observations, DUFFY remembers seeing two people (ambulance drivers or attendants) from Womack Army Hospital, and one was wearing a fatigue jacket, dungarees and boots. In addition, DUFFY is of the opinion that one or more drawers of the bureau on the south wall of the EAST bedroom were open at the time he entered the room. DUFFY stated, ". . . I noticed like the drawers, like stuff hanging out of the drawers, and as if someone had looked through them. . . . (P 251). DUFFY was shown Exhibit A-18 which shows the drawers closed and DUFFY stated this is not how he observed them upon his initial entry. (pps 220-284)

SP4 DENNIS MORRIS, Company A, 503d Military Police Battalion, Fort Bragg, North Carolina, testified he was on MP patrol in the early morning hours of 17 February 1970 and that it was a rainy cold night. He was patrolling the Corregidor Court/Anzio Acres housing areas when he received a radio communication to proceed to 544 Castle Drive. Upon going around the house to the back door with TEVERE, MORRIS saw the two bodies on the floor of the EAST bedroom. TEVERE immediately

summoned assistance and returned with SP4 MICA. 1LT PAULK and possibly the duty officer's driver (DICKERSON). MORRIS then followed the others into the house.

Upon entering the EAST bedroom, MORRIS saw MICA assisting the ACCUSED, MORRIS testified the blue pajama top was on COLETTE's body at this time (as represented in Exhibit A-6), but MORRIS does not remember seeing the white towel.

MORRIS then proceeded down the hallway, but stopped at the end and at the top of the steps. He testified that Exhibit A-9 represented what he saw. In particular, he remembers the white flower pot standing up. At this time MORRIS stated there were four or five MPs in the living room.

Next he returned to the EAST bedroom and was instructed to guard the rear entrance. Initially he did so from inside the utility room for approximately 15 minutes. Thereafter he moved to the outside rear porch and after about 20 minutes he noticed a stick lying on the ground which he thought might have some relevance. After about another hour had passed and it was becoming light, MORRIS stated he saw an ice pick and knife under a bush. When he pointed this out to CID agent he was told not to let anyone disturb these objects. Later, MORRIS observed the knife and ice pick being photographed and boxes being placed over them for protection from the rain. A half an hour later, these items were placed in plastic bags and removed. Small marking sticks were also placed at the site of the club before it was removed (see Exhibit A-20). (pps 289-319)

CW3 DONALD L. KALIN, 573d Personnel Service Company, Fort Bragg, North Carolina, testified that on 17 February 1970, he and his family resided at 542 Castle Drive, which is the adjoining apartment to the ACCUSED. After the ACCUSED and his family moved into the apartment in August or September 1969, KALIN had occasion to visit the ACCUSED's home about four times socially and the ACCUSED visited their home one

time. From August of September 1969, when the MACDONALDS moved into 544 Castle Drive, until February 1970, KALIN never saw the parents argue; in fact, they apparently had a good relationship. KALIN never observed the ACCUSED attempt to harm his children. The ACCUSED told KALIN he was purchasing a pony for his children at Christmas to surprise them.

On 16 February 1970 KALIN went to bed at approximately 2200 or 2230 hours. KALIN's bedroom is over his own living room, however, he also has two bedrooms upstairs which are directly over the ACCUSED's living room —dining room—kitchen area. KALIN heard no unusual noises until he was awakened on the 17th of February by MPs on the ACCUSED's front door. Approximately 45 minutes later CID agents requested him to identify the three victims which he did. (pps 320-330)

CPT WILLIAM P. NEAL, Womack Army Hospital, Fort Bragg, North Carolina, testified he is a physician who was the professional officer of the day at Womack Army Hospital on the night of 16-17 February 1970. He received a call to go to 544 Castle Drive to pronounce bodies dead. NEAL was at the home from approximately 0445 to 0520 hours on 17 February.

When he arrived, he was met at the front door and requested not to disturb evidence. Thereafter he was escorted through the house by a CID agent. Before entering each bedroom, NEAL was requested to await before checking vital life signs until a photographer finished taking pictures of the bodies.

NEAL first visited the NORTH bedroom (KRISTEN's) and stated that Exhibit A-11 represents the scene as he saw it. He pronounced her dead, apparently from stab wounds.

Next NEAL went to the EAST bedroom (COLETTE's) and he stated that Exhibit A-17 represents the scene as he saw it. She was pronounced dead apparently from multiple stab wounds. During his examination, NEAL

removed the blue pajama top from COLETTE's chest. NEAL also had to roll COLETTE over on her side to check her for back wounds.

Lastly, NEAL went into the SOUTH bedroom (KIMBERLY's) and he stated that A-23 represents the scene as he saw it. After examining her, NEAL pronounced her dead apparently from heavy blow to the head although there were stab wounds. (pps 331-353)

MAJ WILLIAM H. STRAUB, Womack Army Hospital, Fort Bragg, North Carolina, testified he was one of the physicians on duty on the morning of 17 February 1970 at the emergency room of Womack. When the ACCUSED was wheeled into the emergency room, STRAUB quickly (2-3 minutes) examined him, noting that the ACCUSED's blood pressure had already been taken and that a vaseline gauze bandage had been applied to his chest wound. Thinking the ACCUSED might have a collapsed lung because of decreased breath sounds, STRAUB sent the ACCUSED to x-ray. After seeing the initial x-ray film, STRAUB concluded the ACCUSED had a 20% collapse of his right lung. Subsequently, 40%)

STRAUB noted a laceration of the ACCUSED's abdomen but considered that not too serious since it had not entered the peritoneal cavity; therefore, STRAUB gave primary emphasis to the chest wound. STRAUB stated that, ". . . If you puncture a lung you don't know whether you are going to get a 10% collapse or a 100% collapse. . . ." (P 363), and that he considered the ACCUSED's partially collapsed lung to be a serious injury. (pps 355-364)

SP6 MICHAEL D. NEWMAN, Medical Company, Womack Army Hospital, Fort Bragg, North Carolina, testified he was the NCOIC of the emergency room on the night of 16-17 February 1970. When the ACCUSED was brought in by ambulance between 0415 and 0430 hours, NEWMAN examined the ACCUSED's wounds and cleaned up the blood on his body. In addition NEWMAN, in a

sworn statement given on 25 February 1970, stated he placed a vaseline gauze pad over the chest wound (Exhibit G-11).

Although the ACCUSED was excited and talking when he came into the emergency room NEWMAN thought his general condition was ". . . very good. . . ." (p 365). Furthermore NEWMAN did not believe the ACCUSED was in shock. During this initial period, the ACCUSED was being questioned by a nurse who was seeking administrative information and by a CID agent part of the time. The ACCUSED asked about his wife and children and described to NEWMAN what he remembered of the attack on him. The ACCUSED also gave a description of the assailants in which he said they were four persons, two of whom were male Negroes.

According to NEWMAN, the ACCUSED was in the emergency room between 20 and 30 minutes, was taken to x-ray, returned to emergency and then taken by NEWMAN to Ward 2-B.

NEWMAN observed that the ACCUSED's blue pajamas bottoms were torn in the crotch and had some blood on them. Ultimately, the bottoms were discarded by an unknown person in accordance with emergency room SOP. (pps 364-376)

MR. DILLARD O. BROWNING, forensic chemist, US Army Criminal Investigation Laboratory, Fort Gordon, Georgia, testified he performed the chemical analysis on fibers, hairs, paints, waxes and wood chips in the MACDONALD case. Upon being shown Exhibits G-7 and G-8, he stated that these two reports contained, in part, the results of his work. BROWNING further described the various scientific procedures used in arriving at the conclusions contained in the Lab Reports.

BROWNING noted that the hair brush which can be seen in Exhibit A-24 (this brush is referred to as Lab Exhibit D-35 on page 2 of the Lab Report (Exhibit G-7)), contained only one hair, dark, apparently dyed, which he judges to be from a female because of its length and waves.

Included in the Lab Report (Exhibit G-7) are several test results listed on pages 14 (fibers, hair, wood splinters and paint) and 15 (wax) which were elaborated upon by BROWNING as follows:

1. Reference fibers: paragraph 27 indicates fibers ". . . could have . . ." originated from the blue pajama top of the ACCUSED (Lab Exhibit D-210).
2. Reference hair: paragraphs 29, 31 and 33 indicate hair ". . . could have . . ." originated from the head of the respective victims. In testimony, BROWNING noted that the known hair samples of KRISTEN came from her head at the time of the autopsy, but that the known hair samples (used for comparison purposes) of COLETTE and KIMBERLY came from outer wear garments in the house. BROWNING stated this latter technique is used in cases of missing persons.
3. Reference wood splinters: paragraph 35 indicates wooden splinters ". . . could have . . ." come from Lab Exhibit A (wooden stick, 31" in length, sometimes described by witnesses as a club).
4. Reference paint: paragraph 37 indicates paint from Lab Exhibit A (wooden stick), ". . . could have a common source of origin . . ." such as the paint found on Lab Exhibit E-203 (paint from sidewalk behind ACCUSED's house).
5. Reference wax: paragraph 32 indicates that waxes found on the bed spread and chair in the SOUTH bedroom and on the coffee table in the living room were ". . . diffeernt . . ." in chemical composition to wax from candles found in the MACDONALD home. BROWNING testified he had received six additional candles (from the MACDONALD house), one multi-colored but as of yet had not done the chemical analysis. (No Lab Report had been received on these samples at the time the hearing closed.) (pps 393-434)

MISS PAMELA KALIN, 542 Castle Drive, Fort Bragg, North Carolina, testified she is a student and the daughter of CW3 DONALD KALIN, who testified earlier. Her

bedroom is located directly over the MACDONALD livinig room and she was asleep there on the night of 16-17 February 1970. Prior to the 17th of February, she often baby sat for the MACDONALDS. She considered the MACDONALD children to be normal and were not abused by the parents, whom she believed were a normal happy married couple. When in her bedroom, she could ". . . hear conversations being carried on in a normal tone in the living room below . . . if its quiet . . ." (p 458). She had been awakened on other occasions when the MACDONALDs had company.

On the night of 16 February she went to bed about 2230 hours but was later awakened by what she believes ". . . was CPT MACDONALD and he was either sort of laughing or a sobbing cry . . ." (p 458). She agreed with the defense description of the intensity or sound level as being somewhere between a scream and a normal conversation. She stated she heard no evidence of a scuffle, furniture being moved or screaming.

She dropped back off to sleep and was next awakened by MPs banging on the door of the MACDONALD residence. (pps 457-463)

SP4 CRAIG S. CHAMBERLAIN, US Army Criminal Investigation Laboratory, Fort Gordon, Georgia, testified he works at the Lab as a chemist and specifically was one of the chemists who worked on blood stains in the MACDONALD case. In addition, he was a member of the Lab Team sent to Fort Bragg to assist in the collection of evidence. This lasted approximately five days beginning at noon, 17 February 1970.

CHAMBERLAIN described the methods employed in obtaining evidence and the scientific techniques used in the typing of blood exhibits. He stated that blood tests were conducted to determine first if the sample was blood; next, if the blood was human blood; and, finally, the type of human blood. Two different experiments (crust and absorbtion elution) were used in determining blood type. CHAMBERLAIN explained that when the Lab Report (Exhibit G-7) states that ". . . red-brown stains . . .

revealed the presence of human blood . . . Type 0 . . .", as in paragraph 4, page 12, this means *all* tests have been conducted and the results are 100% accurate. On the other hand, paragraph 13, page 12, uses the word ". . . indicated . . . Type AB . . .", which means either the crust *or* the absorbtion elution tests were used; therefore, the blood typing is in excess of 90% accurate. From dried blood, chemists can only determine the basic International Blood Group Types (AB, A, B or 0). They cannot determine such factors as RH positive or negative, etc.

In order to make his testimony more meaningful, CHAMBERLAIN provided copies of his working diagrams showing floor plans of the various rooms in 544 Castle Drive. On the diagram he indicates where the blood was found and the blood types when identified (see Exhibits C-20 through G-25).

His examination of the top sheet from the NORTH bedroom (see Exhibit G-16) revealed that most of the blood was Type A. When shown a photo of the white towel found on COLETTE (see Exhibit G-17), CHAMBERLAIN circled on the photo two locations of AB type blood. (pps 435-456 and 465-495)

MSG HILYARD O NEDLIN, US Army Criminal Investigation Laboratory, Fort Gordon, Georgia, testified he is one of the fingerprint-technicians who visited 544 Castle Drive to assist in collecting evidence. He worked on the fingerprints exhibits listed in Exhibits G-7 and G-8 as well as Exhibit C-28, a supplemental Lab Report.

NEDLIN noted that the EAST bedroom phone contained no readable fingerprints, ". . . just smudges and smears. . . ." (p. 500). The telephone in the kitchen also contained no legible fingeprints and NEDLIN thought ". . . that it was rather odd that it was completely stark. . . ." (i.e. devoid of any discolorations, p 501).

There were found on the premises a total of 44 latent fingerprints, 29 latent palm prints and one latent foot print. Of these 21 fingerprints, 6 palm prints and the

footprint were identified, all belonging to either CPT or MRS MACDONALD.

In addition there were 44 fingerprints and 7 palm prints that NEDLIN thought should be capable of being photographed after he viewed them with a magnifying glass. However, apparently because of difficulties in the photography process, they were not useful. Some of these prints were again photographed and were readable for comparison purposes with record prints. (pps 497-537).

MAJ GEORGE E. GAMMEL, Womack Army Hospital, Fort Bragg, North Carolina, testified he is the physician who performed the autopsy on COLETTE on 17 February and supervised autopsies performed by DR. HANCOCK on KRISTEN and KIMBERLY. During the autopsy on COLETTE, GAMMEL supervised the taking of a number of photographs (see Exhibits G-29 through G-32). GAMMEL identified the final autopsy report on COLETTE and it was marked as Exhibit A-25.

GAMMEL observed seven incised (knife) wounds and 21 puncture type (ice pick) stab wounds on COLETTE's chest. Some of these wounds penetrated vital organs (see Exhibit G-29). There were nine knife wounds in her neck with some penetrating the trachea and thyroid which caused much internal bleeding (see Exhibit G-30). Her chest and heart cavities as well as the pericardium were full of enough blood to have caused her to bleed to death.

On COLETTE's head there were six blunt trauma (blows with a blunt instrument). The most significant was the one over her nose which caused a small skull fracture. (See Exhibit G-31). Her arms were bruised and lacerated and both were broken, probably by a blunt instrument. GAMMEL believes they were broken as she was holding both arms up in a protective position. (See Exhibits G-32)

GAMMEL feels that the stab wounds in the chest were fairly perpendicular to the body. He also testified that, as a result of the toxicological work-up on COL-

ETTE, no narcotics or drug abuse type drugs were found in her body. Some hairs (blonde per autopsy report A-25) 4-5″ in length were entwined in the right hand (p 552). COLETTE was four to five months pregnant at time of death. (pps 538-559)

CPT WILLIAM F. HANCOCK, Womack Army Hospital, Fort Bragg, North Carolina, testified he performed autopsies on the bodies of KIMBERLY and then KRISTEN MACDONALD on 17 February under the supervision of GAMMEL. HANCOCK identified Exhibits G-33 and G-35 as being autopsy photographs of KIMBERLY. Exhibit G-33 shows the right side of her face with multiple abrasions to the right ear and cheek and eight to ten stab wounds on her neck which transected the windpipe. Exhibit G-34 shows a severe fracture to her skull and corresponds to other fractures at the base of her skull. Exhibit G-35 shows the left side of her face where multiple fractures inside the skull around and under the eye area can be observed. HANCOCK considered the major wound to be the one to the right side of the head (caused by a blunt instrument); it ". . . was of such severity (as) to cause coma and possibly death shortly thereafter. . . ." (p 564) and was ". . . sustained first. . . ." (P 565). No puncture (ice pick type) wounds were noted on KIMBERLY's body.

HANCOCK next described the wounds sustained by KRISTEN beginning with Exhibit G-37. Four incisional (knife stab) wounds were observed in the left chest area, two of these penetrating deeply and into the right side of the heart. A total of 15 circular puncture (ice pick type) wounds were also noted in her chest area, all of a superficial nature. Exhibit G-38, which is a photo of her back, shows 12 incisional wounds. ". . . These penetrated the left lung cavity, lacerating the lung and . . . penetrated the left heart in two instances. . . ." (p 581). Exhibit G-36 shows several incisional wounds to her right hand; however, HANCOCK testified there were also small incisional wounds to her left hand.

The wounds to KRISTEN's heart sustained from the front and rear were sufficient to cause bleeding to death. The knife wounds were at right or left angles to her body. HANCOCK noted no broken bones or blunt trauma on KRISTEN. (pps 560-584)

MAJ SEVERT H. JACOBSON, Womack Army Hospital, Fort Bragg, North Carolina, testified he was on duty at Womack on the night of 16-17 February as the attending surgeon. JACOBSEN and STRAUB both saw the ACCUSED in the emergency room. JACOBSON described all of the ACCUSED's wounds as superficial except for the chest wound which, upon x-ray, showed a 20% pneumothorax. The ACCUSED was not suffering from shock and he did recall the events that had occurred at his home.

JACOBSON related that the ACCUSED states, among other things, the following: that he was awakened by someone beating on him and he heard his wife screaming; there was a blond haired female holding a candle saying something like "kill the pigs"; there were three males, one a Negro; somebody had a sharp instrument and somebody a club; heard his wife say something to the effect, "Why are they doing this?"; that he examined his children and his wife "looked very bad"; he said, "Be sure to tell the MPs and CID I pulled the knife that was in her chest out"; he mentioned something about an individual named BADGER he had seen as a physician pertinent to drug abuse; and multiple times he asked why his wife and children had not been brought to the hospital. (p 590).

When asked had he been unconscious the ACCUSED could not remember.

JACOBSON saw no evidence of neurological abnormalities and stated the ACCUSED's medical condition was excited, coherent, and alert. His vital signs were stable and, in JACOBSON's opinion, the ACCUSED's medical condition was good to fair.

After consultation with DR. GEMMA later in the morning on 17 February, it was decided to insert a tube (thoracotomy) into the ACCUSED's chest as he then had a 40% pneumothorax.

JACOBSON is of the opinion that a doctor who inflicted a pneumothorax of this nature upon himself would not know what the final medical consequences would be.

JACOBSON indicated that the ACCUSED's chest wound was in the general area of his liver and diaphragm. He agreed with the defense counsel's statements that the other puncture type wounds in the left pectoral region of the ACCUSED's chest ". . . could have touched the lung and the lung could have healed itself. . . ." (p 615) and that, reference head injuries, ". . . there is no medical relation to what the injury looks like on the surface as to what damage it causes to the brain. . . ." (p 616). (pps 586-630)

SP 7 WILLIAM F. IVORY, 503d Military Police Battalion, Fort Bragg, North Carolina, testified he was the CID investigator on duty on the night of 16-17 February. At approximately 0350 hours he was awakened by his radio monitoring set at which time he learned of the incident of 544 Castle Drive. IVORY telephoned the duty photographer, gathered his investigative tools and went to the address with the PMI duty investigator HAGAN ROSSI. There was a light rain; it was quite cool and the ground was wet. Upon arriving around 0400 hours, IVORY observed four MP vehicles and an ambulance and about five MPs outside providing security.

IVORY passed through the 2 MPs at the front door and entered the living room. There he observed LT PAULK and four MPs standing by the desk. After IVORY was briefed by PAULK, IVORY requested PAULK to reduce the number of unnecessary personnel in the house. While they talked, IVORY observed the ACCUSED being wheeled (in a litter) through the living room and out of the house. IVORY was then escorted through the apartment at which time he made

mental notes and, by visual inspection, determined the victims were dead. During this tour, IVORY asked PAULK whether anything had been moved and PAULK said no, except for the telephone in the EAST bedroom. Following this initial inspection IVORY went next door to the KALIN residence and called for investigative assistance. While there, IVORY requested KALIN to identify the deceased which he (KALIN) did.

Thereafter, IVORY continued to make additional observations until photographer SQUIRES arrived. Under IVORY's supervision, the entire house was photographed. IVORY identified Exhibits A-5, 6, 7, 8, 9, 10, 11, 15, 17, 18 and 23 as being photographs which depicted the scene as he first saw it upon his arrival at 544 Castle Drive. Exhibit A-24 is a photo of the body outline of COLETTE after her body was removed. Exhibit A-12 depicts the position of KRISTEN's body following the examination by DR. NEAL.

IVORY then identified 32 additional photographs as Exhibits G-41 through G-72. The following photos show the scene in the various rooms as IVORY observed them upon his arrival at the residence. Exhibits G-41 through G-48 depict the EAST bedroom; Exhibits G-62 through G-66 depict the living room; Exhibits G-50 through G-56 depict the NORTH bedroom; Exhibits G-68 through G-71 depict the SOUTH bedroom; Exhibit G-49 depicts the hall bathroom and finally Exhibits G-57 through G-61 depict the kitchen (with Exhibit G-59 showing blood stains). Exhibit G-67 is a photo showing the body outline of KIMBERLY after her body was removed and Exhibit G-72 depicts a view of the utility room with the door closed. (IVORY testified it was open when he first saw it.)

At 0458 hours IVORY began escorting CPT (DR) NEAL as NEAL inspected the victims and pronounced death. NEAL went first to KRISTEN, then to COLETTE and finally to KIMBERLY. NEAL was requested not to move the position of the bodies any more than was absolutely necessary. IVORY stated NEAL did have to move KRISTEN's body. After NEAL pronounced each victim dead, he immediately departed the premises.

IVORY returned to the EAST bedroom and assisted in the careful removal of the white towel (Exhibit G-73) and the blue pajama top (Exhibit G-74) from the body of COLETTE. These items were then placed in plastic evidence bags. Also collected was the pocket to the blue pajama top (Exhibit G-75) which was lying at COLETTE's foot. After these items of evidence were collected, IVORY supervised the ambulance attendants as they removed all bodies from the premises. As COLETTE's body was removed, IVORY looked at that portion of the rug where her head had rested and saw a thread which he also collected as evidence. In addition IVORY collected numerous (20-25) other threads or fibers from the floor and the mat of the rug in the EAST bedroom.

During the period 17 through 21 February while the Fort Gordon Lab technicians were collecting evidence, IVORY testified that he was present. IVORY took a note of a blood stain that was found on the top edge of an Esquire magazine which was resting underneath the overturned coffee table in the living room. IVORY stated that no blue fibers were found in the living room; however, one thread was found in the hallway, three blue fibers in the SOUTH bedroom and two blue fibers in the NORTH bedroom (one of which was under KRISTEN's fingernail).

IVORY described how, over a period of time, and with varying degrees of force, he caused the coffee table in the living room to be overturned. In each case it landed on its top and not on its edge.

IVORY located eight packages of rubber surgical gloves under the kitchen sink. In the EAST bedroom near COLETTE's head he found a rubber substance ". . . like from a . . . clear rubber glove . . ." (p. 675). In the sheet which was lying on the floor at the foot of the bed in the EAST bedroom, IVORY found an entire bloody finger ". . . of a rubber glove such as a surgeon's rubber glove. . . ." (p. 675). No remaining part(s) of the glove was located.

IVORY stated that DR. NEAL did not move COLETTE's body to examine her back, did not remove the blue pajama top to examine her chest and did not use a stethescope during this examination—all of which NEAL testified as having done.

IVORY also testified that the six-drawer chest in the EAST bedroom had no drawers open when he observed it, that the kitchen door was closed and locked, that there was some wet pieces of grass in the living room on the rug and in the EAST bedroom, and that there was a doll's head on the clothing in the west end of the hallway. When handed Exhibits G-45, G-48, G-54 and G-65, IVORY encircled in red what he believed were the blades of grass he observed. PAULK told IVORY the wet grass were tracked in by MPs. (pps 632-778)

MR. ROBERT H. CAVERLY, Special Agent with Federal Bureau of Investigation, Fayetteville, North Carolina, testified he interviewed the ACCUSED at Womack Army Hospital on 17, 18 and 19 February. With him on all three occasions was CID Agent HODGES. CAVERLY took handwritten notes and asked most of the questions. Later these were transcribed, and CAVERLY identified Exhibits G-76, 77 and 78 as being the product of his three interviews.

The First interview on 17 February lasted from 1426 to 1610 hours. The ACCUSED stated he was under sedation; however, he agreed to the interview and appeared to CAVERLY to be alert and responsive, although the ACCUSED did also appear to be emotionally upset and unable to give a coherent narrative. At the one hour interview on 18 February the ACCUSED was coherent and stated he was not under sedation. On 19 February, the interview lasted 45 minutes at which time the ACCUSED was very alert and coherent. (pps. 703-723).

WG1 ROBERT B. SHAW, Criminal Investigator, Fort Bragg, North Carolina, testified he responded to IVORY's request for investigative assistance and arrived at 544 Castle Drive at approximately 0450 hours. Upon entering the premises, SHAW spoke to MAJ PARSON (Post Deputy Provost Marshal). SHAW briefly noted the appearance of the living room, dining room and kitchen before proceeding down the hallway. He observed the children's bodies in the NORTH and SOUTH bedrooms and noted three strips of blood on the edge of the doorway of the hall linen closet. After glancing into the hall bath, he contacted IVORY in the EAST bedroom.

Once SHAW had observed the EAST bedroom, IVORY requested him to process the SOUTH bedroom for evidence. Shortly afterwards DR. NEAL arrived and SHAW watched him as he checked the victims. SHAW stated that NEAL used no medical instruments during his examinations and that, in the EAST bedroom, nothing was disturbed or moved during the time NEAL was present (alluding to the fact COLETTE's body was not moved as NEAL remembered doing).

Upon NEAL's departure SHAW returned to the SOUTH bedroom. There he looked for fragile evidence, took notes, made sketches and drew the body outline of KIMBERLY as shown in Exhibit G-67.

At approximately 0630 hours SHAW participated in a search of the outside of the apartment looking for footprints (he found none) and other evidence. As he approached his utility room entrance, an MP pointed to a club lying on the ground which he said he had just found and had not touched. SHAW saw reddish-brown stains on it and what seemed to be hairs or fibers. Later SHAW noted the fibers on the club were from the throw rug in the EAST bedroom. Because the photographer lacked flash bulbs, SHAW placed sticks in the ground to mark its location. Then he collected the club as evidence and marked it. (See Exhibits A-20 and G-80 which depict the location.) (IO's Note—The actual club, Exhibit G-79, was examined in the hearing room and was quite heavy for its size.)

Upon continuing his search SHAW's flashlight beam and an MP's statement, caused SHAW to spot an ice pick and a paring knife (both bearing red-brown stains) under a bush at the northeast corner of the house. Since photos could not be immediately taken, SHAW covered the two items with boxes. SHAW instructed the MP to ". . . guard them and not let anyone touch them . . . other than myself (SHAW). . . ." (p 803). Later, after photos were taken, the items were collected and marked as evidence. SHAW identified Exhibits G-81 and A-22 as photos of the scene and identified Exhibit G-82 as the knife and Exhibit G-83 as the ice pick.

At approximately 0800 hours SHAW assisted IVORY in collecting the white towel and blue pajama top from COLETTE's body as evidence. SHAW held a plastic bag under each item as it was raised while IVORY used one hand and tongs for the removal. SHAW observed no threads fall off the garments. Before COLETTE's body was removed from the EAST bedroom by the ambulance attendants, SHAW watched IVORY and CID Agent CONNELLY outline her body (see Exhibit A-24).

SHAW observed the ambulance attendants next remove KRISTEN's body. Prior to the removal of KIMBERLY SHAW uncovered her body and drew an outline of the bedding (see Exhibit G-67).

Exhibit G-84, a small paring knife with a tent blade which was found in the EAST bedroom (See Exhibit G-48) was introduced into evidence. SHAW saw reddish-brown stains on it the morning of 17 February.

(IO's Note—Following considerable discussion between opposing counsel it was agreed that the front cover of the March, 1970, issue of the Esquire magazine (found in the living room underneath the coffee table), which can be seen in the Exhibit G-65 would become Exhibit G-85.)

SHAW testified that he noted about ten spots or streaks of reddish-brown liquid scattered about the ceiling light in the EAST bedroom. These spots or streaks appeared to run in a north-south line. He also identified Exhibit G-14 as a portion of the rug he cut from the

hallway entrance to the EAST bedroom containing reddish-brown stains.

Introduced by SHAW were Exhibits G-87 through G-96 which are expanded diagrams, in chart form, of each room in the MACDONALD apartment, showing the floor, walls and ceilings. The location of positions from which reddish-brown stains were removed is indicated as well as the blood type of the stain if later identified by the CID Lab. Not shown are stains removed from furnishings within the residence.

SHAW identified a piece of wood (Exhibit G-86) he found in the outside storage shed used by the MACDONALDS. He stated ". . . These paints (on Exhibit G-86 and the club, Exhibit G-79) appear to be by visual examination the same color. In addition, the paint is in such a configuration of design that they appear to have similarities . . ." (p 840). (IO's Note—Following visual comparison of the two the IO concurs. Lab reports indicate that the paint could have the same origin.)

On Exhibit G-45 SHAW circled, in blue ink, two areas he recalled as being wet spots that were reddish-brown in color. He also remembered seeing Valentine Day greeting cards on the dining room buffet, some from the ACCUSED to his children. These can be seen in Exhibit A-30 which SHAW recognized.

SHAW described how the premises had been secured subsequent to the initial arrival of the CID. He also stated that the light outside the kitchen door was on when he first went to the rear of the house. He also noted that the lock to the outside utility door entrance functioned properly. (pps 781-926)

CW3 FRANZ J. GREBNER, Commanding Officer of Detachment B, 3d Military Police Group (DI), Fort Bragg, North Carolina, testified that as head of the CID element at Fort Bragg, he was in overall charge of the military portion of the MACDONALD investigation. Furthermore, he coordinated this with the efforts of non-military investigative agencies.

He stated that ". . . in excess of 3,500 people. . . ." were interviewed by all investigative agencies, to include 20 FBI agents, in the first weeks following the murders. In the initial stages the majority of people were questioned about the four alleged assailants.

When GREBNER first arrived at the MACDONALD apartment on the morning of 17 February, he noticed two ambulance drivers inside the apartment. One was wearing a white jacket and blue jean trousers and standing inside the front door. Later they were instructed to go and sit in the ambulances. GREBNER stated that MAJ PARSON said that ". . . road blocks were in effect. . . ." (p 942), but GREBNER does not know where or when.

On a day to day basis GREBNER received all the reports and investigations on the MACDONALD case. He recalled no statements to the effect that (1) the MACDONALDS were in the habit of having violent domestic arguments; (2) that the ACCUSED beat his children; (3) that the ACCUSED showed signs of mental illness; or (4) that he had taken or was addicted to drugs.

GREBNER testified that all voluntary phone calls received by his office about the alleged assailants were checked by investigators. These investigators were to determine whether the individuals fit the description of the assailants and to establish their whereabouts and activities during the period in question. Of the 150-200 people checked, ". . . we were able to establish that these individuals were not on Fort Bragg on the night and morning in question. . . ." (p 948). Each alibi of an individual was checked; however the ACCUSED was never shown any photographs of possible suspects. (pps 927-950).

CW2 BENNIE J. HAWKINS, HHC, 503d Military Police Battalion, Fort Bragg, North Carolina, testified he is a CID Agent who traveled to Suffolk County, New York, in May, 1970, to interview a ". . . colored male (JOSEPH LEE), approximately 5'-9 in height, 170 lbs in weight, black hair and brown eyes. . . ." (p. 902), who associated with a group of three others. From photos and

police records HAWKINS described the others as two Caucasian males—one was 5'10", 180 lbs., dark brown hair and brown eyes, the other was 5'6", 150 lbs. blond hair and blue eyes—and one female, 5'5"/6½", 110 lbs, blond hair and blue eyes. The four were close friends and ran together as a group. They were also friends with the ACCUSED's brother from the summer of 1969 to May, 1970, and lived with him and others in a house on Fire Island, New York.

HAWKINS stated the girl was known (according to police information) to have dressed in knee boots and a floppy hat and had different shade wigs. (pps 951-982).

B. ACCUSED

SP4 KENNETH C. MICA, Company A, 503d Military Police Battalion, Fort Bragg, North Carolina, who previously testified, stated he was enroute to 544 Castle Drive at approximately 0345 hours on 17 February. The patrol vehicle he was in stopped for 4 or 5 seconds at the corner of Honeycutt Road and North Lucas Street. MICA was in the passenger seat, and looking through the plastic side windows of his jeep, saw a female standing on the corner. He estimated her age to be between 20 and 30 years. She was wearing a wide brimmed hat, raincoat cut along the knees and she had ". . . pretty nice legs. . . ." (p 1023).

When MICA was assisting the ACCUSED in the EAST bedroom the latter described his assailants to MICA. MICA then told PAULK he had seen a female at the corner of Honeycutt and North Lucas. MICA had, on occasion seen a female on the corner at that time of night but ". . . it's not very common. . . ." (p 1008).

When shown a composite drawing of the face of a female (Exhibit A-31) MICA stated it could possibly be the person he saw; however, he admitted he could not identify any specific facial features of the girl.

MICA drew a diagram (Exhibit A-32) approximating the location of his vehicle with relation to the female he observed.

He denies telling MR WEISS (PMI investigator) about this incident but states that he did report it to COL KRIWANEK and to the FBI, both on 17 February. (pps 1005-1032)

MRS. WINNIE A. CASPER, 400 North 25th Street, Mineral Wells, Texas, testified by a conference telephone call that on 16-17 February she and her husband resided at 344 North Dougherty which is about 200 yards from the rear of the MACDONALD residence. She stated she went to bed approximately 2345 hours on 16 February and was awakened by her younger daughter at 0345 on the 17th to take her to the bathroom. At some time between 2345 and 0345 (closer to 0345) when ". . . (she was) not quite awake and drifting off to sleep . . . (s) heard laughing, '. . . running . . .' (p 1041) and scuffling. . . ." (p 1035) outside her open bedroom window on the second floor. She said she heard two male voices and one female voice and thought it was teenagers. She also heard a giggle and believes the voices were going in the direction of Castle Drive.

When her husband came home for supper on 17 February he asked if something woke her up ". . . last night, and I said, yes it did, and he said, well, was it kind of laughing, you know, sound like the kids next door, and I said, yes. . . ." (p 1036).

MRS CASPER thinks, upon questioning by government counsel, that she remembers her husband telling two CID agents at approximately 1800 hours on 17 February that he heard running and footsteps between 1900 and 2130 hours on 16 February. (pps 1032-1045)

CPT JAMES N. WILLIAMS, HHC, 6th Special Forces Group, Fort Bragg, North Carolina, testified he is an MSC officer who is the Operations and Training Officer

with the Surgeon's Office. WILLIAMS worked with the ACCUSED from December, 1969, to February, 1970, As the Group medical drug abuse counselor the ACCUSED would talk to soldiers who requested counseling. In mid-January, a lecture was conducted for all Group personnel on the subject of drug abuse. During the Chaplain's part of the lecture, he said he was the only person who had ". . . privileged conversation . . ." (p 1132) and that, at a court-martial, if a doctor is called to testify, he (the doctor) would not be able to shelter an individual.

Following the lecture WILLIAMS testified many young soldiers asked him ". . . if this was true. . . ." (p 1132) and WILLIAMS said yes. WILLIAMS stated that the following week there was a noticeable drop in the number of soldiers requesting medical drug abuse counseling.

Later WILLIAMS was told by some of his enlisted medics that ". . . they believed their men were being turned in to CID for being on drugs. . . ." (p 1133) and that the ACCUSED had the reputation of being a "fink". When WILLIAMS related this information to the ACCUSED, he laughed. (pps 1125-1147)

PROFESSOR WILLIAM G. WOLFGANG, Philadelphia College of Textiles, Philadelphia, Pennsylvania, testified by conference telephone call that he is a member of the faculty with his primary duty being the Director of Textile Apparel Research. He had the opportunity to examine the testimony of witness BROWNING, the forensic chemist from the CID Lab, as well as the CID Lab Reports relative to threads (yarns) and fibers.

WOLFGANG stated that in order to properly compare fibers of a mixed variety (cotton polyester, for example) the chemist needs at least a gram of the material; for yarns, he needs a piece at least a yard long. ". . . in textile identification we can actually say a lot more about where things didn't come from than where they did. . . ." (p 1174). Also, in identifying fibers, he said ". . . you could say that it could have come from a particular source, but you cannot say with any degree of certainty that it did come from it. . . ." (p 1175).

(IO-s Note—CID Chemist BROWNING used the same identification terminology, "could have", reference fibers in paragraph 26 of Exhibit G-7. (pps 1154-1176)

MRS. ELIZABETH ANN KRYSTIA, 301 Spear Drive, Fort Bragg, North Carolina, testified she met COLETTE while both were attending a night course in child psychology at the North Carolina State University branch on post. A friendship developed as both were pregnant and they drove to and from class together.

KRYSTIA stated COLETTE had great respect for her husband, that COLETTE's pregnancy was not planned and that she seemed ". . . relaxed and calm. . . ." (p 1181) on the evening of 16 February. In class that evening COLETTE raised the question of what to do about their youngest child coming into bed with them at night. The professor suggested returning the child to her own bed after reassuring her. COLETTE indicated she was satisfied with his advice.

Upon departure from class between 2120 and 2130 hours COLETTE drove to a PX Shoppette, purchased milk and then drove KRYSTIA home. KRYSTIA planned to, within the next day or two, take some books on child psychology to COLETTE. (pps 1177-1185)

MRS. SUSAN CHESTER, Post Office Box 767, Pinehurst, North Carolina, testified by conference telephone call, that in February, 1970, she and her husband lived at 306 Castle Drive, adjacent to the apartment of MRS. JAN SNYDER. On 17 February MRS CHESTER and her husband (then CAPT CHESTER) returned home for lunch and conversed with MRS SNYDER. MRS SNYDER told them that she was awakened that night (16-17 February) sometime after 0300 hours because her daughter was crying; that she heard a car running outside her house; that she looked out the windows and saw a girl with long blond hair running from the direction of the

MACDONALD house; and that this girl got into a red or maroon colored convertible and it pulled away.

Approximately two weeks later the CHESTERS related this information to FBI agents who came to their apartment. (pps 1192-1212)

MR. JOHN CHESTER, Post Office Box 767, Pinehurst, North Carolina, testified that in February, 1970, he was an Army Captain living at 300 Castle Drive adjacent to the apartment of MRS SNYDER. On 17 February Mr CHESTER returned home for lunch and heard MRS SNYDER say, in his and his wife's presence, that she (SNYDER) was awakened between 0300-0330 hours (on the night of 16-17 February) by her children yelling; that she heard a commotion outside in front of the apartment; and that she looked out the window and saw a woman, with long hair, and some men get into an automobile and drive away. MR CHESTER was not present for the entire conversation on the subject.

Ten days or two weeks later an FBI agent was given the information and three weeks after the incident MR CHESTER went to the CID office and related the information. MR CHESTER testified he was also present when MRS SNYDER related the same information to three neighbors.

Later, on 21 February at approximately 0800 hours, MR CHESTER was in bed when he was awakened by the sound of MRS SNYDER banging on the wall separating their apartments. He asked her, through the wall, what was wrong and she stated there was somebody out front with a gun. MR CHESTER went to the front bedroom, looked out and saw a late model light colored sedan with two individuals in it. The driver had a high-powered rifle with a telescopic sight which was pointed at the second story level of their apartment building. He went to get a shotgun and when he returned the car was driving off and was about 100 yards up the street. Immediately MRS SNYDER came over to the CHESTER apartment and together they telephonically reported the

incident to the MPs. MR CHESTER testified the driver of the car was a man and he did appear to be looking through the sights of the rifle. He could not observe the other individual in the car. There were other people outside at the time but MR CHESTER did not remember how many. He drew a diagram (Exhibit A-34) of the area which illustrated the general position of the vehicle he observed on the 21st. (pps 1212-1239)

DR. ROBERT L. SADOFF, The Benjamin Fox Pavillion, Jenkintown, Pennsylvania, testified he is a civilian psychiatrist with a speciality in forensic psychiatry. He examined the ACCUSED in Philadelphia on 21 April 1970 and engaged a clinical psychologist (DR. JAMES MACK) to conduct psychological testing, which results were used by SADOFF. He stated the goal of his psychiatric examination was ". . . to determine whether or not Captain MacDonald possessed a type of mental state that would be likely to result in the kind of tragedy or killings that occurred in his family . . ." (p 1241). His specific goal was ". . . to search for evidence for types of mental state that would be conducive or would even allow for this type of behavior. . . ." (p 1241).

SADOFF next described the methodology employed to reach his findings. He considered the fact that the ACCUSED, as a medical doctor, would have some knowledge of psychiatry. During the examination he feels the ACCUSED; cooperated fully and was not hiding facts or holding back information; had a normal reactive depression resulting from the deaths in his family; had no serious mental illness; ". . . Captain MacDonald felt guilty he was not able to save them (his family). . . ." (p 1248); and that, ". . . if I had found that he (ACCUSED) had sufficient psychiatric problem, emotional disability, then I would have told them (counsel for the ACCUSED). . . ." (p 1251).

SADOFF's conclusion was that the ACCUSED, ". . . does not possess the type of personality emotional configuration that would be capable of this type of killing of

his wife and children with the resultant behavior . . . that I saw in him on the 21st (of April . . ." (p. 1250). SADOFF also ". . . questioned him (ACCUSED) about things that perhaps he wasn't clear about or could not remember. He was not defensive about it. He accepted the idea that he could not remember some things or that things were very hazy. . . ." (p 1254). Upon being questioned would it be normal of the ACCUSED to be depressed if he had committed the crimes, SADOFF stated ". . . he (the ACCUSED) would not only be depressed, but he would be unable to compose himself . . . I think he would become psychotic . . ." (p 1255). When asked is and was the ACCUSED legally sane SADOFF replied, ". . . . I would say he knew the nature and quality of his acts and was able to adhere to the right. . . ." (p 1261).

Counsel for the government and counsel for the ACCUSED each asked a number of hypothetical questions relative to the ACCUSED's capability to do or not to do specific things. (IO's Note—All answers were satisfactory from the standpoint that the ACCUSED would not be able to successfully deceive the psychiatrist.)

In answer to a question by the Investigating Officer, SADOFF stated, ". . . It's rare that I'm asked to see a person to find out whether or not he possessed the mental capacity sufficient to be able or to be capable of such violence . . ." (p 1266). When asked could the ACCUSED have killed his wife if COLETTE had first killed the children the witness stated, ". . . I don't think its a great likelihood . . ." (p 1266), and later, ". . . it's highly unlikely, most extremely unlikely from my examination . . ." (p 1267).

In summary SADOFF does not believe the ACCUSED was capable of committing the crimes and if he had the ACCUSED would have become psychotic and could not have hidden this fact from the psychiatrist. (pps 1234-1269)

MR WILLIAM E. POSEY, 505 Mrytle Street, Fayetteville, North Carolina, testified that during January-

February, 1970, he lived in Apartment A, 1106 Clark Street, in the Haymount Section of Fayetteville. In the apartment across the driveway from his front door lived three "hippie-type" girls, one of whom was named HELEN (later identified by IVORY as HELENA STOKELY). POSEY described HELEN as having brunette hair and she normally wore a white hat and had a long stringy blond wig. POSEY stated the three girls lived there approximately three months and he would see HELEN a couple of times a day. During this period the girls had many (up to 30) people living or visiting with them to include soldiers and one Negro.

On 16 February, at approximately 2300 hours, POSEY went to sleep and awakened about 0345 to 0430 hours, 17 February, to go to the bathroom. At that time he "heard a car next door whip in . . . . real fast . . ." (p 1298) in the driveway. POSEY heard laughing and giggling so he walked to his front door. He saw HELEN get out of a MACH I Mustang, without a hat, and walk rapidly into her apartment with ". . . something in her hand. . . ." (p 1299). Judging by the sounds, the car contained at least two males. After HELEN got out the car drove away. Previously, POSEY had seen a blue MACH I Mustang at the girls' apartment, driven by a neat appearing male approximately six feet tall who had a mustache.

POSEY awakened his wife to show her that the other two girls in the apartment were painting designs on the walls and floor at that unusual time of the morning.

Approximately a week or two later POSEY had an occasion to talk to PAUL BOWMAN, a friend of both POSEY and the girls. They were talking outside when HELEN came up to them and stated that the police had questioned her several times, apparently shortly after the MACDONALD murders, concerning her whereabouts on the morning of 17 February. HELEN stated she could not remember where she had been because she was "stoned" on mescaline. She only recalled riding around that evening. She said she threw her boots away because they had a broken heel. She also threw away her hat but still had her blond wig. BOWMAN said HELEN

needed an alibi and when POSEY told them ". . . I can be her alibi because I saw her that morning . . ." (p 1305), HELEN ". . . kind of backed off . . ." (p 1305).

On the day of the MACDONALD funeral services on Fort Bragg, POSEY testified HELEN wore a black dress, black shoes, a veil and had a wreath on her door. She stayed in her apartment alone all day. When her boyfriend came by she refused to go out with him. Before this she generally wore purple clothes but after 17 February she always wore black.

POSEY stated that HELEN had been previously charged with possession of drugs. Most of her friends were in the Army. On one occasion, POSEY told the landlord, MR. TURNER, there were many people at the girl's apartment and that they made a lot of noise. TURNER came by that same evening and kicked out 10 or 15 guys and girls.

Prior to 17 February HELEN was always with her boyfriend but afterwards POSEY did not see him until the day of the MACDONALD funeral services.

On 11 August 1970, at the request of counsel for the accused, POSEY went to the Village Shoppe (in Haymount Hills) to attempt to learn HELEN's full name. POSEY located her and questioned her about the MACDONALD murders. He asked her, ". . . 'Well, did you do it? Were you a part of it?' and she said she dosen't know, just drew a blank, but . . . she didn't think she could kill anyone because she wasn't that type of person. . . ." (pps 1327-1328). Toward the end of this one hour conversation outside the Shoppe HELEN's boyfriend JIM drove up in his 1964-1965 yellow Plymouth. POSEY immediately departed (pps 1297-1342)

MR JOHN D. SUTTON, 110 Spring Avenue, Spring Lake, North Carolina, testified that on the evening of 17 February he was in Rick's Lounge on Hay Street opposite the railroad station in Fayetteville. From about 1900 to 2100 hours he had three or four beers. At about 2100 while standing at the far end of the bar (away

from the street entrance), he looked at the front door and saw ". . . a girl come in carrying a lighted candle, lit, and wearing a floppy hat. . . ." (p 1367). She was also wearing pants. With the girl were two white men. SUTTON also saw one Negro, wearing a fatigue jacket with Sergeant's stripes, standing in the corner of the bar.

Later, when SUTTON read an account in the Wednesday issue of the local newspaper describing a girl with a floppy hat and a candle, he stated he called a SCOTTIE SUTHERLAND of the CID (unidentified) to report his observations in the lounge. Approximately a week later SUTTON contacted the FBI and they stated they had the information.

During his testimony SUTTON drew a floor diagram depicting Rick's Lounge and the location and movement of people as he remembered it (see Exhibit 6-104). (pps 1366-1391)

MRS BARBARA DAW, 119 LeBlanc, Fort Bragg, North Carolina, testified she is the wife of CW2 DAW. In the summer of 1969, MR. DAW was stationed in Vietnam and MRS DAW resided in Fayetteville. She took in a female boarder. Two of the boarder's male companions (soldiers) were thought by MRS DAW to be involved in drug trafficking. She stated they threatened her and her two children named CHRIS AND KIM, and they took her car for their own use.

MRS DAW reported this incident to the North Carolina State Bureau of Investigation. Present at the time was a Chaplain (name unknown) from Fort Bragg. She wrote her husband in Vietnam and he returned on emergency leave and remained for reassignment to this area. In November 1969 they moved on post into Corregidor Courts at 119 LeBlanc Street. (pps 1392-1410, 1416, and 1418-1421)

CW2 ROY DAW, Headquarters Company, 6th Special Forces Group, Fort Bragg, North Carolina, testified he is the husband of MRS DAW. In August 1969, DAW

received a letter from his wife stating two men had taken her car and threatened to kill her and the children. DAW immediately came home on emergency leave. He located one of the two men, RANDLE FOSTER. FOSTER was a soldier terminee from the Special Forces Training Group awaiting reassignment orders. FOSTER blamed the other individual, TOM McCORMICK, for everything but did sign a note in the presence of his Commanding Officer for $620.00 damage to the DAW car. FOSTER then departed for Vietnam.

Later, in February or March, 1970, DAW was able to trace the location of McCORMICK to Vietnam. He was stationed in the same unit as FOSTER. On 17 February when DAW heard of the MACDONALD murders and noted the similarity of his childrens names to that of the MACDONALD children, he decided to call the CID. He then reported the incidents of the previous summer. (pps 1410-1415, and 1416)

The defense called approximately fifteen character witnesses to testify. Because most of it is both lengthy and repetitious, I have decided to present it in summary form.

Several civilian and military witnesses testified they observed the ACCUSED and his family, both socially and otherwise. Included within this group are: MRS ROBERT KINGSTON, wife of the former commander of the 3d Special Forces Group at Fort Bragg (pps 382-385); MRS CAROL BUTNER, whose husband was also a doctor with the 3d Special Forces Group, Fort Bragg (pps 1099-1106); MRS JEAN Morrell, whose husband is also a doctor and a former classmate of the ACCUSED in medical school (pps 1106-1111); DR. FREDRICK HERTER, who was a member of the surgical attending staff while the ACCUSED interned at Columbia Presbyterian Hospital (pps 1119-1125); MR ROBERT K. STERN, friend of the MACDONALDS (pps 1343-1347); COL ROBERT KINGSTON, former commanding officer of the 3d Special Forces Group, Fort Bragg (pps 377-381); CAPT and ILT (mrs) RICHARD

THOESEN, the MACDONALD's sponsors when they first arrived at Fort Bragg (pps 1086-1099); CPT FRANK MOORE and CPT JAMES WILLIAMS, MSC officers who worked with the ACCUSED in the 3d and 6th Special Forces Groups (pps 1111-11119 and pps 1125-1147); and MSG LEO J. VIOLETTI, the MCOIC of the medical section in which the ACCUSED worked (pps 1149-1153). In each case, these witnesses observed a close and loving intrafamily relationship. Professionally, he was thought of as both an excellent soldier and physician.

Two medical doctors who went through medical school with the ACCUSED and his family also testified. They were DRS PAUL MANSON (pps 1054-1072) and ROBERT C. McCANN (pps 1072-1086). While in medical school, they testified the ACCUSED both excelled academically and was a good husband and father. Both observed the ACCUSED while he was in Womack during the week 17-26 February 1970.

MRS BOBBIE SUE EVANS, a civilian nurse who is employed by the Hamlet Hospital, Hamlet, North Carolina, testified she worked with the ACCUSED, to include the 15th of February 1970. She stated he was a good doctor who displayed both compassion and understanding when treating children (pps 1046-1054).

MISS MARJORIE MURDOCK, an elderly lady from New York, testified she had formerly been a patient of the ACCUSED while he was interning in New York. She believed that the ACCUSED was one of the most humane doctors that ever treated her during her numerous stays in the hospital. (pps 1166-1192)

MR ALFRED KASSAB, the step-father (of 14 years) of COLETTE testified he had known the ACCUSED since age 12 because his step-daughter and the ACCUSED began seeing one another at that age. KASSAB observed their relationship from that time until the present and formed the opinion that theirs was nothing but a normal happy family situation. Because KASSAB was close to COLETTE, he was of the opinion she could not hide her emotions from him. KASSAB related an incident in which the ACCUSED apparently saved COLLETTE's

life shortly after the birth of their second child while COLETTE was in the hospital recovery room. Lastly, he emotionally offered the statement that he would still want the ACCUSED as his son-in-law if he had another daughter. (pps 1347-1363)

CAPTAIN JEFFREY R. MACDONALD, Headquarters and Headquarters Company, 6th Special Forces Group, 1st Special Forces, Fort Bragg, North Carolina, testified he is 26 years old and was president of his class and of the student council in high school, a member of various school organizations and a co-captain of both the football and the baseball teams. He attended Princeton for pre-med schooling on a partial scholarship and attended Northwestern for his medical degree where his class standing was 12th among 164 graduating students. He interned in surgery at Columbia Presbyterian Hospital in New York City. He married COLETTE in his second year at Princeton and both worked to get him through school and to pay living expenses. COLETTE was pregnant at the time of the marriage (p M-5).

The ACCUSED volunteered to come into the United States Army and, in turn, for assignment to the Special Forces, arriving at Fort Bragg 29 August 1969. During part of his off-duty time he "moonlighted" at Cape Fear Valley Hospital in Fayetteville, North Carolina, and at the Hamlet Hospital in Hamlet, North Carolina (p-M9). On Sunday, 15 February, at 0600, the accused began a 24-hour shift at the Hamlet Hospital. He did not see many patients that day, took one short nap during the day and slept approximately six hours that night. He returned to Fort Bragg on Monday morning, 16 February, had breakfast with his family and went to work at the 6th Special Forces Group Surgeon's Office. He had lunch at home, returned to work and at approximately 1600 hours played basketball.

Upon returning home he picked up KRISTEN and KIMBERLY and took them to feed their pony. The family ate dinner, prior to 1800 hours because his wife left for

class at North Carolina State University at 1815 hours. The ACCUSED then put the dinner dishes into the sink and watched TV with the children after putting them in their pajamas. At approximately 1900 hours he put KRISTEN to bed with a bottle of milk, returned to the living room floor and fell asleep. KIMBERLY awakened him so they could watch the TV program "Laugh In" together. At 2100 hours he put KIMBERLY to bed and returned to watch TV.

COLETTE returned home between 2130 and 2145 hours, put the milk she had purchased in the refrigerator and changed into her pajamas. She came into the living room and they watched TV and had some routine conversation. The ACCUSED thinks COLETTE may have had a drink (liquer) and watched part of the Johnny Carson Show. He thinks she went to bed around midnight. At some time after his wife had retired, KRISTEN awoke and the ACCUSED refilled her bottle and he heard no more from her. He finished watching the Johnny Carson Show and then washed the dishes, using rubber gloves he thinks.

Reference rubber gloves in the kitches he states, ". . . she had several kinds around. It was at least two pairs on the kitchen sink. There was a heavy yellow kitchen type of glove and some of the surgeons gloves that I had brought her home . . ." (p M-83).

Next the ACCUSED completed reading a Micky Spillane mystery while listening to a FM station on the stereo set. He was wearing his glasses while reading. He cut off the stereo, probably went to the small bathroom off the utility room but did not check doors to see if they were locked (p M-85). He states that a light in the kitchen and one in the hall bathroom were on when he was ready to retire. Lights were left on at night for the children in the event they awakened.

When the ACCUSED went into the EAST bedroom he found KRISTEN on his side of the bed (right side, facing the foot of the bed) asleep. She had wet the bed on his side so he pushed the c vers down along COLETTE and returned KRISTEN TO HER OWN BED. She had

her bottle with her at the time she was back in her own room.

Next he obtained an Afghan type blanket and went to the couch in the living room, shortly after 0200 hours, his head to the south end of the couch. His sleep was interrupted by COLETTE's ". . . very loud high pitched scream . . ." and then she said ". . . help, help Jeff. Why are they doing this to me? . . ." (p M-25). He also heard KIMBERLY screaming, "Daddy, Daddy" over and over. At this time he started to sit up and initially saw three people at the foot of the couch, two white males, one with a thin mustache, and a Negro with an Army field jacket to their right. Next he noticed a person, apparently female, with long blond hair and a light colored large floppy hat. The outline of her face appeared to be lit from underneath (p M-99). As the Negro was moving towards the ACCUSED between the coffee table and the couch, he heard the girl say, "Acid is groovy, kill the pigs", at least twice, and once said something like, "Acid and rain" (p M-27).

The Negro approached the ACCUSED with what appeared to be a raised club and swung it, striking the ACCUSED on the left arm and left forehead and knocking him back flat on the couch, causing him to literally see stars (p M-29). He then pushed himself back up again and he partially blocked the next swing of the club as he grabbed the Negro's arm and was holding the club. The ACCUSED attempted to get his left foot off the couch for leverage and then the two white males began to punch him on the chest, neck and shoulders and suddenly he ". . . got a very sharp pain in my chest, my right chest. . . ." (p-M-32). He then directed his attention to the two males at the end of the couch.

At this time his pajama top had, in some unknown manner, gotten around his wrists. He grabbed hold of a hand of one of the white assailants and noticed a blade and realized that he was in serious trouble. He is under the impression the hand was covered with a heavy rough grained rubber glove (p M-98). He attempted to get his hands free and to fend off the assailants when he was again hit by the club, this time in the shoulder. By this

time he thinks his left foot was on the floor, his right knee on the couch and he was pushing forward into the assailants at the foot of the couch, and last remembers seeing a knee and the top of what he thinks was a boot, probably on the hall stairs or at the end of the hall, and presumes the leg was that of a female. The entire episode took fifteen to thirty seconds in his estimation (p M-33).

The ACCUSED apparently lost consciousness because the next thing he remembers is lying at the living room end of the hall, face down, with his hands under his abdomen and still entwined in the pajama top. His teeth were chattering. His head and chest hurt, and he realized it was very quiet and the last thing he heard was screaming. He walked to the EAST bedroom and thinks he turned on the light. When he saw COLETTE, he took off the pajama top and dropped it, he went to COLETTE who was leaning against the green easy chair, removed a knife from her chest and threw it away. He then ". . . probably straightened her out a little bit . . ." (p M-107), gave her mouth to mouth resuscitation for a few seconds and noticed the air immediately bubbling out of her chest where he could see multiple wounds. He specifically remembers picking up his pajama top, opening it up, and laying it on COLETTE. He may have covered her with the white "Hilton" towel or something else but does not remember doing so (pps M-109-110).

Next the ACCUSED went to KIMBERLY's room, noticed a lot of blood on her neck and gave mouth to mouth respiration or checked pulses on this first of two trips to her room (p M-110). He noticed air coming from her chest and then went across the hall to KRISTEN's room. He checked her pulses and also gave mouth to mouth with the same results. Following this he went into the hallway, felt his head, noticed some blood on his hands and that his chest was bubbling. He then went into the lighted bathroom to check his injuries. He noted a contusion on his left forehead and, probably because his hands were bloody, washed his hands in the bathroom sink and thinks he dried them with tissues. He then went into the EAST bedroom again, checked COLETTE for a pulse, found none, pulled the pajama top down to again look at her

wounds and then dialed "O" on the telephone for the operator (pps M-41-42). (In subsequent questioning by government counsel the ACCUSED thinks he went directly to the telephone to call and then checked COLETTE, p M-114.)

He told the operator his name, that there had been stabbings, and that he needed police, MPs and doctors. The operator asked him if the address was on or off the post; he replied on post and she said it's an MP matter. Thinking he was getting no assistance from the operator he dropped the phone and then, noting the back door in the utility room was open, walked over to it and looked out but saw nothing of importance.

Next the ACCUSED again went to KIMBERLY's room and then to KRISTEN's room to check the children as it was difficult for his mind to accept what his doctors training told him was true reference their injuries and status. He then went down the hall into the kitchen, picked up the phone and heard both male and female voices. He repeated his request for assistance and heard someone say ". . . make that ASAP from Womack . . ." (p M-122) and thinks he dropped the phone. He thinks he washed his hands again at the kitchen sink either before or after the second telephone call. His next recollection is struggling with an MP who was breathing into his mouth in the EAST bedroom.

The ACCUSED remembers the scene in the EAST bedroom as being somewhat confused as there were several people (MPs) there, shouts and orders were heard, some tried to reassure him that everything was okay, but when he looked at COLETTE he thinks he said ". . . Jesus Christ, look at my wife. . . ." (p M-47). He remembers being questioned by several people in bits and pieces as to what happened, who did it, could he recognize the assailants, etcetera, and vaguely remembers falling off the stretcher in the hallway while being removed from the apartment.

The ACCUSED described his wounds as he observed them in the hospital noting some small puncture wounds (possibly ice pick type) which were apparently not observed or recorded by the treating physicians. Further

he states that although he saw investigators and phoned GREBNER at various times from 17 February up to and including April 6 he was never asked to view any person or photographs to determine if they resembled the assailants. He states that although several rings were returned to him at his request, there are two he has still not received.

When he went to the CID office on 6 April he was under the impression that MR. GREBNER would act upon his request to release some of his furniture from 544 Castle Drive. He was confused when MR GREBNER proceeded to read his rights against self incrimination and when MSSRS GREBNER, IVORY AND SHAW began to question him with a desk light shining in his face. He states that previously he, ". . . had never sat down with anyone and gone over the chronology, sequence of events or the full story of what had happened. . . ." (p M-65), but that, on the contrary, he had been trying to forget what had happened that night. They told him ". . . they felt that I had committed the crime. . . ." (p M-70).

The ACCUSED then related how his attorneys finally, after several previous attempts, convince him that he should have an artist attempt to draw an approximation of the assailants as he remembered them on 17 February. This was accomplished during a two week recess in the Article 32 hearing. Of the four drawings (Exhibit A-31, female; Exhibit A-36, man with mustache; Exhibit A-40, man without mustache; and Exhibit A-41, Negro) his recollection is best of the Negro and the white male with the mustache. At this time he also identified Exhibit A-42 (white floppy hat) as being similar to the one the female assailant wore on 17 February.

The ACCUSED related how KRISTEN had been awakening each night for a month or so and would frequently get into bed with her parents or with her sister. As a result sometimes one of the parents would move into KRISTEN's bed or onto the living room couch or KIMBERLY would move to KRISTEN's bed. The ACCUSED thought KRISTEN should be returned to her own bed but COLETTE didn't mind moving or giving KRISTEN a bottle if that was what she wanted. The ACCUSED did

not consider this an unusual situation as it had occurred with KIMBERLY when COLETTE was pregnant with KRISTEN.

When asked did the situation ". . . cause any particular stress or strain between your wife, what Kristy was doing . . .", the ACCUSED said ". . . absolutely not . . ." (p M-23). He also stated, ". . . you know your own family would never believe your word as a physician—and she said she would bring it up with her professor at the University . . ." (p M-23). When asked if he objected, the ACCUSED stated, ". . . absolutely not, because I knew he was going to say what I said. . . ." (p M-23).

Further questioning revealed that the ACCUSED loved his wife more than anything in the world, did not consider his children to be more important than his wife, does not think his wife was capable of murdering the children and that he devoted the additional time his Army service afforded him equally to his wife and children (p M-72). Upon cross examination by government counsel he admitted to sexual contact with a WAC in Texas in December 1969 and very, very infrequently during his marriage. He further stated that these events did not affect his relationship with his wife and that he did not tell her about them (p M-131).

He stated that when treating drug addicts in the hospital they would frequently threaten, as a common bad drug reaction is acute paranoia. On two separate occasions in early January, 1970, he informed a commanding officer and a First Sergeant that he had treated drug abusers from their commands. He denies ever previously seeing the two paring knives or the ice pick which were introduced into evidence and feels certain they did not come from his residence (p M-139).

In answer to questions by the Investigating Officer he stated that he has no idea whose hair was on the hair brush found by COLETTE's body, does not know why small pieces of surgical gloves were found in the top sheet from the EAST bedroom, remembers crying silent tears while going around to the various bedrooms, did not pull the covers from the bed in the EAST bedroom, has the impression the hands of some assailants he grabbed were

covered with heavier than surgical rubber gloves, does not remember checking the utility room rear entrance door to see if it was locked (assuming he used the small bath to brush his teeth), did not hear any furniture overturned during the struggle and, when asked, ". . . did you murder COLETTE and your children? . . ." replied, "No, sir." (p M-160). (pps M-1 through M-160 and 1650-1654).

C. GOVERNMENT REBUTTAL

SS6 DAVID L. WEISS, 125th Military Police Detachment (CI), Fort Bragg, North Carolina, testified he was on duty on 17 February as the senior investigator of the Provost Marshal Investigation Section at Fort Bragg. During the morning hours of that day SP4 MICA stopped WEISS in the hallway of the Provost Marshal's Office to pass on information relating to a female he (MICA) had observed while enroute to the MACDONALD residence as a result of the initial radio call.

WEISS stated MICA described the female as dressed in a raincoat with a rain bonnet and 5'6" in height with either light brown or blond hair. She was not wearing boots and she did have good looking legs. (pps. 1433-1441)

MR VERNON C. PARK, Pelham, North Carolina, testified that on 17 February 1970, he worked as the operations sergeant for the Provost Marshal Investigation Section. Between the hours of 1700 and 1915 on 17 February he and SGT JUDSON queried residents who were at home and residing on North Dougherty Street in Corregidor Courts to determine if they had seen or heard anything unusual on the night of 16-17 February.

PARK stated he questioned LT and MRS CASPER at their apartment front door. LT CASPER said he had gone to bed about 2230 hours. During the course of the evening between 1900 and 2130 he heard some

running foot steps and that they belonged to some children in the neighborhood.

PARK asked MRS CASPER if she had anything to add and also ". . . did you wake up during the night? . . . .", and she answered no to both questions. (pps 1441-1459)

MR JAMES G. JUDSON, Post Office Box 5555, Spring Lake, North Carolina, testified that on 17 February 1970 he was working as a Provost Marshal Investigator. He accompanied PARK to interview residents living on North Dougherty Street in Corregidor Courts.

JUDSON was present when PARK questioned the CASPERS and PARK made notes. JUDSON remembered LT CASPER saying he retired at 2230 hours but, prior to retiring, he had heard some kids running up and down outside between the hours of 1900 and 2100. (pps 1460-1463)

DR. RUSSEL S. FISHER, 111 Penn Street, Baltimore, Maryland, testified he is a pathologist of some years experience who interviewed the doctors who initially treated the ACCUSED. FISHER also spoke with the attending surgeon. FISHER also examined the medical records of the ACCUSED and, in the hearing room, examined his upper torso to determine the exact location of the wound that caused the pneumothorax.

FISHER stated that all of the ACCUSED's injuries could have been self-inflicted. He did not consider the head wound to be of significance. In FISHER's opinion, the stab wound that produced the pneumothorax, if shallow, would not be serious if treated, ". . . but if you enter a couple of inches you are going to get it in the diaphragm and into the liver. . . ." (p. 1496). FISHER further testified that when a knife is inserted two to four inches in that area (area of the ACCUSED's chest wound), ". . . then (that) makes it a serious business. . . ." (p 1498).

SP7 WILLIAM F. IVORY, 503d Military Police Battalion, Fort Bragg, North Carolina, is a CID agent at Fort Bragg who has previously testified. This current testimony relates to two separate interviews IVORY had with HELENA STOKELY, the first occurring in the offices of the Fayetteville Police Department, and the second some days/weeks later in the Cumberland County Jail. The first interview lasted approximately one hour, the second one-half to one hour. Answers to the same type questions during the second interview were basically the same as during the initial interview. (Apparently no attempt was made to check out the details of her first interview for inaccuracies prior to the second interview.)

(IOs Note—STOKELY was interviewed by the CID as a result of prior Article 32 testimony by POSEY who testified that he had seen STOKELY return home at approximately 0400 hours on 17 February 1970 in a Mustang car with some other people. POSEY further testified he was told that STOKELY had no alibi for her whereabouts during the early morning hours of 17 February and also that he (POSEY) had seen her sitting on the front steps of her apartment dressed in black and with a wreath on the front door on the date the MACDONALD funeral services were held at Fort Bragg.)

STOKELY, a red head, told IVORY she remembers driving out alone and returning alone (departing after midnight and returning about 0400 hours) on 17 February in a blue Mustang owned by a white male named BRUCE described as about 20, a former soldier and has dark hair. She was "on marihuana", left the house (apartment) sometime after midnight, ". . . just driving aimlessly. . . ." (p 1521), and because she was taking marihuana, she cannot remember her whereabouts for those four hours. She stated, according to IVORY, that she owned a large floppy hat but gave it away to a person unknown, had black boots but threw them in the trash; occasionally wore a blond wig borrowed from a girl friend (name unknown) which was returned subsequent to 17 February; and she refused an opportunity to testify in court (Article 32 hearing) because she, ". . . didn't want to get involved . . ." (p 1516).

STOKELY remembers Negroes visiting her apartment on occasion with EDDIE being the only name she can recall; when asked was she wearing black clothes on the date of the MACDONALD funeral she said, ". . . probably yes. . . ." (p 1593). She remembers that the FBI questioned her on 19 February; when asked was she in the MACDONALD house on 17 February, she said no and, ". . . She's sure if she had been there she would have known it. . . ." (p. 1553).

She willingly posed for a photograph (Exhibit G-105) following the first interview but seemed sensitive to IVORY's attempt to take notes of the interview so he took none.

IVORY is of the opinion that the FBI did interview STOKELY in February (under aliases unknown to IVORY) and that they were apparently satisfied with her alibi (for her whereabouts on 16-17 February). He believes that STOKELY's fingerprints were forwarded to the CID Laboratory at Fort Gordon for identification purposes but cannot say under what name or alias.

The Investigating Officer questioned IVORY on a separate matter relating to rubber surgical gloves. IVORY stated he did not see any surgical gloves on the kitchen sink (although MACDONALD remembers a pair being there when he washed the dishes on the night of 16 February) nor on the dryer in the utility room. IVORY did see a piece of a surgical glove near the left arm and head area of COLETTE. (pps 1508-1556)

D. ARTICLE 32 OFFICER

MRS JAN SNYDER, Route 5, Fairmont, North Carolina, testified she and her husband lived at 306 (?) Castle Drive. On the night of 16-17 February she was awakened by a noise (possibly a car) and went to the window. Going down the street was a car with round tail lights. She was unable to recall what time it was, and she does not remember hearing voices or seeing anyone running. She denies ever telling MR or MRS CHESTER, her next

door neighbors, or others that she saw or heard anyone that evening. (IO's Note—This testimony is in direct conflict with that of the CHESTERS).

Approximately 1020 hours on 17 February she reported to some investigators who came to her apartment the noise and sighting of the car.

On Sunday immediately following 17 February, MRS SNYDER and her husband were having breakfast when she looked out the window and saw a car with two young boys. One was holding a gun. She thinks the car was a light colored Buick convertible. Immediately she called the MPs. The person was holding the gun up, he was seated on the passenger side and the car was heading downhill. MRS SNYDER denies banging on the wall dividing the SNYDER AND CHESTER apartments to get assistance from CHESTER. (IO's Note—Parts of her testimony are in direct conflict with that of MR CHESTER.) (pps 1270-1294)

LTC BRUCE H. BAILEY, Walter Reed General Hospital, Washington, D.C., testified he is the Chief of Psychiatry Services. In response to a request by Investigating Officer, he and two other board certified psychiatrists conducted an examination of the ACCUSED. BAILEY also utilized the services of DR. JONAS RAPPAPOR who is a qualified psychiatrist specializing in forensic psychiatry. BAILEY was given background briefings by representatives of opposing counsel, had access to a copy of DR SADOFF's Article 32 testimony, the ACCUSED's testimony, results of a clinical psychologist's (DR JAMES MACK) testing of the ACCUSED, a summary of character witnesses testimony and finally selected testimony of witnesses who observed the ACCUSED immediately following the murders. CPT SEALE, the Article 32 Legal Advisor, handcarried the above listed documents to BAILEY.

BAILEY stated an electroencephalogram was accomplished on the ACCUSED and the reading was normal. He introduced his official report of the psychiatric evaluation (Exhibit R-1). When asked whether or not the time differential between when SADOFF saw the ACCUSED (two months after the murders) and BAILEY saw the ACCUSED (six months) affected the accuracy of his diagnosis, BAILEY said ". . . I think that the time factor is not significant, no. . . ." (p 1561). BAILEY stated that each member of his team concurred in the findings as reflected in Exhibit R-1 and that his position as Chief of the Service did not influence the opinion of the other two doctors involved in the psychiatric evaluation.

BAILEY testified the primary question that precedes all others is ". . . is . . . or was there any evidence of emotional disease, defect or derangement. . . ." (p 1561). BAILEY's opinion is that the ACCUSED knew right from wrong, was able to adhere to the right, was able to form intent with regard to the specific acts and the ACCUSED was able to cooperate in his own defense.

It is the opinion of BAILEY and his staff that the answer to the Investigating Officer's ". . . question regarding (the ACCUSED's) capability to commit a given act (this crime) is not within the realm of the psychiatric expert . . ." (p 1562). DR RAPPAPOR ". . . very definitely. . . ." (p 1564) agreed with BAILEY and his colleagues on that point. However, BAILEY's report (Exhibit R-1) did state "Our answer to the question regarding capability is that it is possible." When asked by the Investigating Officer could this statement be paraphrased by saying ". . . . anything's possible? . . .", he said, ". . . . Pretty close to that. . . ." (p 1574).

To the Investigating Officer's question concerning the ACCUSED's capability to hide this from himself and/or evaluators, BAILEY again stated, ". . . this is possible . . . (but) I have no evidence or impression that this was the case in terms of deliberate behavior . . ." (p 1562).

When asked how the ACCUSED would handle a sense of frustration in inter-personal relationships within his own family, BAILEY pictures him as ". . . working it out on the basketball court or going to the hospital and taking care of a lot of patients. . . ." (p 1590). BAILEY considers this a normal response. Also, BAILEY does not

think that the ACCUSED's recitation of the events of 17 February was a contrived story.

BAILEY further stated ". . . I have the rather strong impression that his (ACCUSED's) memory of the 16th and 17th is reconstructed . . . I consider it highly possible that details, major or minor, as to specifically what happened in the context of that time might well have been different from his . . . most recently stated under testimony, memory of that time. . . ." (p 1595). Later, in elaboration on this point and when asked by counsel what the process was that caused that (the reconstruction of events) BAILEY related ". . . the most common process is a very natural one that all of us human beings can experience when we've gone through something that is quite horrible to us. We put it out of our minds. We may tend to deny it. We may tend to restructure it somehow to make sense to us. I'm talking about very natural processes. . . ." (p 1597). BAILEY was also favorably impressed by the fact that the ACCUSED frequently could not give concrete answers to questions but would respond with "It must have been this way because that's the way we usually did it" (p 1597). Finally, on this point BAILEY thought that it was equally possible that the process of putting horrible details out of one's mind would be natural whether the ACCUSED had been the victim or had committed the crimes.

BAILEY agreed that there was no evidence that the ACCUSED was trying to hide facts from him. (pps 1557-1599)

1LT EDWIN G. CASPER, JR., 4th Student Officer Company, Fort Wolters, Texas, testified by conference telephone call that he formerly resided at 334 North Cougherty Street (Corregidor Courts), Fort Bragg. On the night of 16-17 February 1970 he went to bed approximately 2230 hours; however, his wife stayed up to watch TV. CASPER stated the windows in their bedroom were open. Sometime between 2400 and 0300 hours, CASPER was awakened and heard what he though were neighbor's children running up the path and splashing their feet in

water. He heard footsteps, laughing and running, probably from two or more people; the first time it ". . . seemed like they were running up from North Dougherty towards Bragg Boulevard . . ." (p 1605). He rolled over and went back to sleep. Approximately a half-hour later while half-asleep, CASPER heard them a second time. ". . . and it seemed like they ran back the other way . . ." (p 1605).

CASPER remembered that the CID questioned him at his home on 17 February, but he does not clearly remember his answers to their questions.

(IO's Note—During his testimony CASPER, on several occasions, paused for lengthy periods before answering questions. When Counsel asked, ". . . Are you conferring with someone as you answer these questions? . . . .", his answer was, ". . . Sir, my wife is trying to tell me what happened. . . ." (p 1606) (pps 1600-1607)

2LT JOSEPH L. PAULK was recalled and testified that on 17 February he was the MP Duty Officer. He was instructed by COL KRIWANEK to obtain from the ACCUSED a description of the assailants. PAULK identified a copy of his notes (Exhibit R-6) of that interview which occurred sometime between 0600 and 0700 hours on 17 February. The interview only lasted five to ten minutes and was conducted on one of the upper floors of Womack Army Hospital. After refreshing his memory by reading the notes, PAULK had nothing to add from memory to the ACCUSED's description of the assailants. (pps 1608-1612)

SSG WILLIAM A BOULWARE, 118th Military Police Company, Fort Bragg, North Carolina, testified that on the night of 16-17 February, he was the Military Police Desk Sergeant on duty at the Post Provost Marshal Office. At approximately 0342 hours on 17 February he received a telephone call from the chief telephone operator, Fayetteville. She said she had a party on the line she believed

lived at Fort Bragg and the party kept uttering, ". . . stabbing, 544 Castle Drive, hurry, 544 Castle Drive, help. . . ." (p 1613). BOULWARE told the radio operator located behind him, to send a patrol. She transferred the call to BOULWARE's line and he heard similar words. He then heard a ". . . clinging noise like the phone hitting against the wall or . . . something . . ." (p 1613). He assumed the ACCUSED dropped the phone. In approximately a minute he heard a weak whisper, ". . . 544 Castle Drive, stabbing, help . . ." (p 1613).

BOULWARE tried to determine from the ACCUSED what had happened but received no response to his questions. He told LT PAULK, who was in the building at the time, what he had heard on the phone and also told him he thought it was a domestic disturbance. PAULK departed for the address.

When the first patrol arrived at the residence he heard them call back over the radio and say the front door was locked. Roughly ten minutes elasped between the last time the witness heard the ACCUSED and the arrival of the first patrol. Over the phone BOULWARE heard someone (MP) say, ". . . we're here now. . . ." and ". . . get us an ambulance over here, get a couple . . ." (p 1614). At this time BOULWARE hung up the phone.

On the radio BOULWARE heard one patrolman say that there were two bloody bodies there, to get Womack fast and BOULWARE assumed the MP's partner was inside the house and that the was the one who picked up the phone. PAULK subsequently phoned BOULWARE and said words to the effect, ". . . we've got three bodies . . . I believe they're goners, and . . . thinks the old boy (ACCUSED) is still alive. What's holding Womack up?. . . ." (p 1616).

Next an ambulance driver said, over the radio, that he was lost so BOULWARE dispatched a patrol to guide them to 544 Castle Drive. Also over the radio he heard MP WILLIAMS describe the assailants as two male Negroes, one Caucasian and one female wearing a floppy hat. Assuming that all patrols were monitoring this description BOULWARE instructed them ". . . to stop any suspicious people in the area, fill out interrogation reports

and . . . 10 1 7 (bring them in). . . ." (p 1617). At approximately 0400 hours some patrols began to circulate in the Corregidor Courts, Mallonee Village and part of the Anzio Acres housing areas. Several called in and said they had stopped cars and were bringing people in to the Provost Marshal Office. BOULWARE remembered two sergeants who were getting ready to go to work and one person in a phone booth at Mallonee Village Shopping Center that were subsequently brought in. BOULWARE assumes that those patrols not permanently assisting at 544 Castle Drive returned to patrolling.

In answer to the question, ". . . Did any of your superiors instruct you to establish road blocks for purposes of apprehending the alleged assailants? . . ." (p 1618). BOULWARE answered in the negative.

Later PAULK called BOULWARE from the hospital and changed the description of the assailants to ". . . one male Negro wearing an Army field jacket with NCO chevrons on the sleeves, two Caucasians, one female. She had on a floppy hat and she was wearing boots. . . ." (p 1624). (pps 1612-1624)

CW3 FRANZ J. GREBNER, was recalled and testified that he is the Chief of the Fort Bragg CID. Primarily he was recalled to explain the administrative delay in the receipt of CID Lab Reports (See Exhibits G-107 and G-108). At the request of the Investigating Officer, he introduced COLETTE's pajama top (Exhibit R-7) and pajama bottom (Exhibit R-8) and the blue top sheet (Exhibit R-9) and multi-colored bed spread (Exhibit R-10) from the EAST bedroom. (pps 1625-2649)

E. IO'S VISITS TO 544 CASTLE DRIVE

As the hearing progressed, it became readily apparent that it would be beneficial for the Investigating Officer to personally view 544 Castle Drive, the MACDONALD

residence. Two visits were made, the first on 9 July 1970 and the second on 19 August 1970.

On the first visit, the Investigating Officer and his Legal Advisor were accompanied by the ACCUSED, counsel for both sides, the recorder and MR SHAW of the CID. The investigating Officer generally familiarized himself with the physical layout of the apartment and the contents therein, with the exception of various evidentiary items which had previously been removed and sent to the CID lab. (pps 276-280)

The details of the second visit were announced in the hearing by the Investigating Officer, as follows: ". . . Let the record reflect that during our recess, on 19 August 1970, between the hours of 2100 and 2200, Captain Beale and I were escorted by Mr. Grebner, Chief, CID, Fort Bragg, to revist 544 Castle Drive. Captain Beale made all arrangements with Mr. Grebner. I specifically instructed him to inform Mr. Grebner that at no time would I discuss the facts of the case with Mr. Grebner or ask any questions. Those instructions were obeyed completely during my visit and Mr. Grebner's sole function was to secure the premises. During my visit I made certain observations as a result of entering all rooms. I now wish to inform counsel for both sides of the relevant observations as follows. Number one, in the utility room I generally noted the titles of the many pocket type books located therein. Number two, I noted the presence of feathers in several rooms. Number three, I read the messages on the several Valentine cards in the dining room. Number four, I measured and noted the height of the ceiling in the living room was the same as the height of the master bedroom ceiling. Number five, I observed that there were no nicks on either the living room ceiling or the ceiling in Kimberly's bedroom. Number six, I saw a few pair of rubber surgical gloves under the kitchen sink, apparently in their original packaging. Number seven, I simulated the lighting conditions as per the accused's testimony. From a prone position on the couch, the length of which I noted, I was able to discern the facial features of Captain Beale at the end of the couch. The visibility increased considerably when I sub-

stituted as my source of light the lamp on the small dining room buffet. Number eight, and finally, I kicked over the coffee table. It struck the side of the rocking chair and came to rest on its edge. Upon my departure from the premises, they were again secured by Mr. Grebner. . . ." (pps 1425-1426)

I N D E X

WITNESS		FOR	VOLUME
BROWNING, DILLARD O.		GOVT	V
BUTNER, CAROL		ACCUSED	X
CASPER, WINNIE		ACCUSED	X
CAVERLY, ROBERT H.	Agent	GOVT	VII
CHAMBERLAIN, CRAIG	SP4	GOVT	V
CHESTER, JOHN W.		ACCUSED	XI
CHESTER, SUSAN		ACCUSED	XI
DAW, BARBARA		ACCUSED	XII
DAW, CORNELIUS	CW2	ACCUSED	XII
DUFFY, ROBERT J.	SGT	GOVT	III
EVANS, BOBBIE SUE		ACCUSED	X
GAMMEL, GEORGE E.	MAJ	GOVT	VI
GREBNER, FRANZ J.	INV	GOVT	IX
HANCOCK, WILLIAM F.	CPT	GOVT	VI
HAWKINS, BENNIE	INV	GOVT	IX
HERTER, FREDERICK	DR	ACCUSED	X
IVORY, WILLIAM F.	INV	GOVT	VII
JACOBSON, SEVERT	MAJ	GOVT	VII
KALIN, DONALD L.	CW3	GOVT	IV
KALIN, PAMELA		GOVT	V
KASSAB, ALFRED		ACCUSED	XII
KINGSTON, ROBERT	COL	ACCUSED	V
KINGSTON, ROBERT	MRS	ACCUSED	V
KRYSTIA, ELIZABETH		ACCUSED	XI
LANDEN, CAROLYN		GOVT	I
MANSON, PAUL	DR	ACCUSED	X
MCGANN, ROBERT	DR	ACCUSED	X
MEDLIN, HILYARD	MSG	GOVT	VI

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WITNESS		FOR	VOLUME
NICA, KENNETH C.	SP4	GOVT	II
		ACCUSED	X
MOORE, FRANK	CPT	ACCUSED	X
MORRELL, JEAN		ACCUSED	X
MORRIS, DENNIS	SP4	GOVT	IV
MURDOCK, MARJORIE		ACCUSED	XI
NEAL, WILLIAM P.	CPT	GOVT	IV
NEWMAN, MICHAEL D.	SP6	GOVT	V
PAULK, JOSEPH L.	1LT	GOVT	I
POSEY, WILLAM		ACCUSED	XII
SADOFF, ROBERT L	DR	ACCUSED	XI
SHAW, ROBERT B.	INV	GOVT	VIII
SNYDER, JAN		IO	XI
STERN, ROBERT		ACCUSED	XII
STRAUB, WILLIAM H	MAJ	GOVT	V
SUTTON, JOHN D.		ACCUSED	XII
TEVERE, RICHARD D	SGT	GOVT	III
THOESEN, MARY	1LT	ACCUSED	X
THOESEN, RICHARD	CPT	ACCUSED	X
VIOLETTI, LEO J.	MSG	ACCUSED	X
WILLIAMS, JAMES	CPT	ACCUSED	X
WOLFGANG, WILLIAM G		ACCUSED	XI
MACDONALD, JEFFREY R	CPT	ACCUSED	Unnumbered

10 EXHIBITS

R-1	Report of Psychiatric Evaluation
R-2	Credentials of Dr Bailey
R-3	17 Feb Sworn Statement of SP/4 Dickerson
R-4	25 Jun Sworn Statement of SP/4 Dickerson
R-5	22 Jun Sworn Statement of Mrs Janice Pendlyshok
R-6	Lt Paulk interview 17 Feb 70 W/Cpt MacDonald
R-7	Pajama top of Colette MacDonald
R-8	Pajama Bottom of Colette MacDonald
R-9	Blue top sheet from M.B. bed
R-10	Multicolored bed spread from M.B.. bed

ACCUSED'S EXHIBITS

A-4 Small house diagram.

A-5 Photo of MacDonald's wife.

A-6 Photo of MacDonald's wife.

A-7 Photo of doll and material near front room steps.

A-8 Photo of dining room to couch - coffee table area.

A-9 Similar photo, smaller scene.

A-10 Photo of master bedroom showing bureau w/phone.

A-11 Photo of female child, rear bedroom.

A-12 Photo of female child, rear bedroom. (Different perspective.)

A-13 B & W photo of master bedroom w/phone.

A-14 B & W photo of living room looking towards hall entrance - can see chairs and overturned coffee table and photog's equip.

A-15 Color photo of hall from living room and looking toward master bedroom and Mrs MacDonald's body.

A-16 (This is A-9)

A-17 Photo of Mrs MacDonald showing upper part of jacket w/blood and edge of bed.

A-18 View of south wall of master bedroom showing left side of bureau w/drawer closed.

A-19 TRUE POLICE magazine photo of photographer taking picture of bush and scene outside the MacDonald house.

A-20 Rear view of MacDonald residence showing stoop.

A-21 Photo of stick.

A-22 B &W photo of bush on NE corner of house.

A-23 Photo of child in front bedroom.

A-24 Photo of master bedroom showing blood on floor where Mrs MacDonald lay.

ACCUSED'S EXHIBITS (Continued)

A-25	Autopsy report of COLETTE
A-26	Final Autopsy report of KIMBERLY
A-27	Final Autopsy report of KRISTEN
A-28	Medical records of CPT MacDONALD while at WAH
A-29	Page 68 from book Grays Anatomy, 28th edition (shows lung design)
A-30	Photo of dining room area from living room.
A-31	Drawing of young female.
A-32	Diagram of location of young woman.
A-33	Christmas card from Colette MacDonald.
A-34	Drawing of area surrounding 306 Castle Drive.
A-35	Copy of Doctor Sadoff's credentials.
A-36	Drawing of man w/moustache
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A-42	Sample of floppy hat.
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GOVERNMENT EXHIBITS

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G-4	SGT Tevere's written statement.
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G-8	Lab Report # 70-R thru R4
G-9	Lab Report # 70-R5
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G-11	SP6 Newman's statement.
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G-13	Photo of portion of rug in master bedroom showing spotty red brown stains.
G-14	Photo of rug (Exhibit D-207).
G-15	Photo of master bedroom viewing closet and 5-drawer chest.
G-16	Photo of sheet from North bedroom w/red brown stains. (EXH D 60 HB)
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G-21	North bedroom, SP Chamberlain's diagram.
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G-27	Prefix Key for Government Exhibits.
G-28	Supplemental lab report of finger prints.

G-29	Color photo of COLETTE's breast.
G-30	Color photo of COLETTE's upper chest, throat & lower face.
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G-58	View of kitchen phone receiver and cord.

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G-65 View of under side of coffee table

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G-68 View of left part of child's bed and book stand, front bedroom

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G-75 Pocket of blue PJs

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G-77 CAVERLY's two page statement.

G-78 CAVERLY's two page statement.

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SUPREME COURT OF THE UNITED STATES

No. 75-1892

[Received July 13, 1977, Office of Solicitor General]

UNITED STATES, PETITIONER

v.

JEFFREY R. MACDONALD

ORDER ALLOWING CERTIORARI. Filed June 20, 1977

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1977 243991 49